CERTIFICATE

(18,087.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 277.

RUDOLF HELWIG, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 The United States Circuit Court of Appeals for the Second Circuit.

RUDOLF HELWIG, Plaintiff in Error,
against
THE UNITED STATES, Defendant in Error.

Writ of Error to the Circuit Court of the United States for the Southern District of New York.

This cause coming on for hearing before the court, and it appearing by the record that there is involved a question of the jurisdiction of the circuit court, it is ordered that the following statement of facts and the question arising thereon be certified to the Supreme Court for its instruction:

Statement.

In February and March, 1895, Rudolf Helwig, plaintiff in error, made three certain importations of wood pulp into the United States, entering the same at the custom-house at the port of New York. As the facts are substantially the same in respect to each importation, except as to values, amounts, date, &c., they are spoken of herein as one importation.

2 At the time when said wood pulp was imported the duty imposed by law on wood pulp was ten (10) per centum ad valorem, (paragraph 303 act of August 28, 1894).

Upon making the entries at the custom-house, Helwig declared the invoice and market value to be marks 191 per ton; the aggregate invoice value of all three importations was $13,252.00 in United States currency; at the time of making the entries Helwig paid to the collector of customs $1,325.20, being the duty upon said wood pulp at the rate of ten (10) per centum ad valorem based upon the invoice value.

The merchandise was thereafter appraised by the United States appraiser, as provided in section 7 of the act of June 10, 1890, (26 Stat. at Large 131), who reported that the foreign market value of said wood pulp was marks 263.70 per ton; Helwig thereupon requested a reappraisement by a United States general appraiser, in accordance with section 13 of the act of June 10, 1890; a reappraisement was had and the United States general appraiser reappraised the market value of said wood pulp at marks 245 per ton net; thereupon Helwig appealed to the board of United States general appraisers, in accordance with said section 13 of the act of June 10, 1890, and said board affirmed the decision of the United States general appraiser, thereby deciding that the foreign market value of said wood pulp was marks 245 per ton net, and making an advance over the invoice and entered value of over twenty-seven per centum.

Thereupon the collector of customs liquidated said entries, fixing the dutiable value of all of said merchandise at $16,792.20, and computing the duty thereon at the rate of ten per centum, at $1,679.20, and made demand upon said Helwig for the sum
3 of $354, being the difference between the amount already paid by Helwig and the amount of duty at the rate of ten (10) per centum ad valorem found to be due on said final reappraisement; thereafter Helwig paid the sum of $354, and that amount is not in question on this appeal.

At the time the collector of customs found said additional sum of $354.00 to be due, as aforesaid, he also found and decided that there was due from Helwig to the United States the further sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68) and made demand for said amount, said amount being the further sum in addition to the duties imposed by law, ascertained and fixed as provided in section seven of the said act of June 10, 1890, being two per centum of the total appraised value of said merchandise for each one per centum that such appraised value exceeded the value declared in the entry.

Before the commencement of this action, Helwig duly presented his petition to the United States district court for the southern district of New York, claiming that said sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68) was a penalty, and praying that the district judge would cause an investigation of the facts to be made, in accordance with section 5292 of the Revised Statutes and sections 17 and 18 of the act of June 22, 1874 (18 Stat. at Large, 186) and cause the facts to be stated and transmitted to the Secretary of the Treasury, and praying that said penalty be remitted on the ground that it had been incurred without willful negligence or intent to defraud.

The said district judge caused such summary investigation to be made and a statement of the facts shown thereon was duly
4 transmitted to the Secretary of the Treasury, who, thereafter, and on the 6th day of July, 1898, found and decided that said penalties had been incurred without willful negligence or intention of fraud on the part of said Helwig, and thereupon mitigated the penalties to one-half of the amount thereof, namely, $4,533.84.

Subsequently the collector of customs reliquidated said entries reducing the amount of said further sum to $4,533.84, and again made demand upon Helwig for payment. As Helwig did not pay the amount suit was commenced against him in the circuit court for the southern district of New York, on the 24th of August, 1898. Upon learning of the pendency of that suit, however, the Secretary of the Treasury advised the collector that he revoked his decision of the 6th of July, 1898, and directed the collector to reliquidate the entries at the original amount and to request the United States attorney to institute suit for nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68).

The collector followed these instructions and again reliquidated the entries accordingly.

The suit then pending was discontinued and the present action begun, including the full amount of the penalty, namely, nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68).

The case was tried at the circuit court upon an agreed statement of facts.

Upon the reading of the agreed statement of facts, the plaintiff in error moved to dismiss the complaint and for the direction of judgment in his favor on the ground that the action was to recover a penalty or penalties arising under the customs laws, and that under the provisions of sections 629 and 563 of the Revised Statutes, the United States circuit court had no jurisdiction in such an action. The motion was denied and plaintiff in error duly excepted.

The court subsequently directed judgment in favor of the United States for the amount of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), together with interest and costs.

The defendant thereafter sued out his writ of error to this court.

The sum for which judgment was rendered, namely, nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), being the "further sum" accruing "in addition to the duties imposed by law," upon wood pulp, under the provisions of section seven of the act of June 10, 1890, the following question is certified as aforesaid:

Question.

Has the United States circuit court jurisdiction of an action to recover the aforesaid "further sum" accruing "in addition to the duties imposed by law," under the provisions of section seven of the act of June 10, 1890, (26 Statutes at Large, 131)?

WM. J. WALLACE,
U. S. Circuit Judge.
E. HENRY LACOMBE, *U. S. C. J.*

UNITED STATES OF AMERICA, *Second Circuit,* } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit,

Do hereby certify that the foregoing certificate in the case entitled Rudolf Helwig against The United States, was duly filed and entered of record in my office by order of the said court on the 5th day of February, 1901, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, this 6th day of February, in year of our Lord one thousand nine hundred and one.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

7 [Endorsed:] United States circuit court of appeals, second circuit. Rudolf Helwig *v.* United States. Certificate to Supreme Court. United States circuit court of appeals, second circuit. Filed Feb. 5, 1901. William Parkin, clerk.

Endorsed on cover: (Certificate.) File No. 18,087. U. S. C. C. of appeals, 2nd circuit. Term No. 277. Rudolf Helwig, plaintiff in error, *vs.* The United States. Filed March 21st, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 277.

RUDOLF HELWIG,
Plaintiff in Error,

vs.

THE UNITED STATES.

Brief for Plaintiff in Error.

This cause comes before this Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

Statement of the Case.

In February and March, 1895, Rudolf Helwig, the plaintiff in error, imported at the port of New York certain wood pulp, and entered the same at the Custom House.

The duty then imposed by law on wood pulp was 10 per centum *ad valorem* (Paragraph 303, Act of August 28, 1894).

There were three separate importations and Helwig, upon making the Custom House entries, declared the value of the wood pulp to be Marks

191 per ton; the aggregate declared and entered value was equivalent to $13,252 and Helwig, at the time of making the entries paid to the collector of customs the sum of $1,352, being the amount of duty then imposed by law upon wood pulp, at the rate of 10 per centum of the declared and invoice value.

The merchandise was appraised by the United States appraiser, as provided by Section 7 of the Act of June 10, 1890 (26 Stat. at Large, 131), who reported the market value of this particular wood pulp to be Marks 263.70 per ton, instead of the Marks 191 per ton as declared by Helwig. Thereupon Helwig requested a re-appraisement by a United States general appraiser, in accordance with the provisions of Section 13 of the Act of June 10, 1890 (*supra*); the re-appraisal having been had, the general appraiser re appraised the market value at Marks 245 per ton, net; Helwig appealed to the Board of United States general appraisers, in accordance with the statute above cited, and thereafter that Board affirmed the re-appraisal of the general appraiser, namely, deciding that the foreign market value of said wood pulp was Marks 245 per ton; thereby showing that the merchandise had been undervalued by Helwig by over twenty-seven per centum.

Upon this final re-appraisal, which is declared by the statute to be final and conclusive as to the dutiable value of such merchandise against all parties interested therein (Section 13, *supra*), the collector of customs re-liquidated the entries, fixing the aggregate dutiable value of such merchandise at $16,792.20, and, computing the duty imposed thereon by law, at the rate of 10 per centum *ad valorem*, at $1,679.20, made demand upon Helwig, for the sum of $354.00, being the difference between the amount already paid by Helwig ($1,-

325.20) and the sum of $1,679.20; thereafter Helwig paid the said sum of $354.00, so that the entire amount of the 10 per centum *ad valorem* duty imposed by law on this wood pulp has been paid and is not now in question in this case.

But at the time when the collector of customs found the sum of $354.00 to be due from Helwig, he also claimed that there was due from Helwig to the United States, on this wood pulp, the further sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), and made demand for that amount also, such amount being the "further sum in addition to the duties imposed by law," ascertained and fixed by the collector of customs as provided by Section 7 of the Act of June 10, 1890 (*supra*), being two per centum of the total appraised value of the wood pulp, for each one per centum by which such appraised value exceeded the entered value (page 2, folio 3). That section provides, among other things:

> "And if the appraised value of any article of imported merchandise shall exceed by more than ten per cent. the value declared in the entry, there shall be levied, collected and paid, *in addition to the duties imposed by law on such merchandise, a further sum*, equal to two per cent. of the total appraised value for each one per cent. that such appraised value exceeds the value declared in the entry."

The duty imposed by law on this merchandise was $1,679.20; all of which Helwig paid. The "further sum" demanded *in addition to the duty imposed by law* on this merchandise was $9,067.68.

Before this action was commenced Helwig duly presented his petition to the United States District Court for the Southern District of New York, claiming that the said sum of Nine

thousand sixty seven dollars and sixty-eight cents ($9,067.68) was a penalty, and praying that the District Judge would cause an investigation of the facts to be made, in accordance with Section 5,292, of the Revised Statutes, and Sections 17 and 18 of the Act of June 22, 1874 (18 Stat. at Large, 186), and cause the facts to be stated and transmitted to the Secretary of the Treasury, and praying that the said penalty be remitted on the ground that it had been incurred without willful negligence or intent to defraud (page 2, folio 3).

Thereupon the District Judge caused such summary investigation to be made and a statement of the facts appearing thereon was duly forwarded to the Secretary of the Treasury, who, thereafter, and on the 6th day of July, 1898, found and decided that said penalties had been incurred without willful negligence or intention of fraud on the part of Helwig, and, thereupon, the Secretary mitigated the said penalties to one-half the amount thereof, namely, $4,533.84 (Page 2, folio 4).

Thereupon the Collector of customs again re-liquidated the entries in question, reducing the amount of the "further sum in addition the duties imposed by law," to $4,533.84, and made demand upon Helwig for payment of the reduced amount. As, however, Helwig did not pay the amount demanded, an action was begun against him for the recovery of the $4,533.84, in the United States Circuit Court for the Southern District of New York, on the 24th of August, 1898. Upon learning of the pendency of that action the Secretary of the Treasury advised the collector of customs at New York that he (the Secretary) revoked his decision of July 6th, 1898, by which he had mitigated the penalty, and directed the collector to re-liquidate the entries at

the original amount, and to request the United States attorney to institute suit for the full amount of the penalty, namely, Nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), (page 2, folio 4).

The collector followed these instructions and again re-liquidated the entries accordingly (page 2, folio 4).

The United States thereupon discontinued the first action for the $4,533.84, and commenced another action, again in the Circuit Court, against Helwig for the sum of $9,067.68, and it is in this latter action that this certificate comes before this Court.

The case was tried at the Circuit Court upon an agreed statement of facts.

Upon the reading of the statement of facts, the plaintiff in error moved to dismiss the complaint and for the direction of a judgment in his favor upon the ground that the action was to recover a penalty or penalties arising under the customs laws, and that under the provisions of sections 629 and 563 of the Revised Statutes, the United States Circuit Court had no jurisdiction in such an action (page 3, folio 4).

The motion was denied and the plaintiff in error duly excepted.

The Court subsequently directed judgment in favor of the United States for the sum of $9,067.68, together with interests and costs (page 3, folio 5).

The plaintiff in error thereafter sued out his writ of error to the United States Circuit Court of Appeals for the Second Circuit (page 3, folio 5).

Thereupon the Circuit Court of Appeals, stating that the sum for which judgment was rendered, namely, $9,067.68, was the "further sum" accru-

ing "in addition to the duties imposed by law," upon wood pulp, under the provisions of Section seven of the Act of June 10, 1890, certified the following question to this Court, namely:

Question.

Has the United States Circuit Court jurisdiction of an action to recover the aforesaid "further sum" accruing "in addition to the duties imposed by law," under the provisions of Section seven of the Act of June 10, 1890 (26 Statutes of Large, 131)? (page 3, folio 5).

Argument.

The plaintiff in error contends that the question certified should be answered in the negative of the ground,

(*a*) That the "further sum" imposed for undervaluation "in addition to the duties imposed by law" upon imported merchandise, is a *penalty* and not a customs *duty*, and,

(*b*) That actions to recover penalties arising under the customs laws, are not within the jurisdiction of the United States Circuit Court, but are solely within the jurisdiction of the United States District Court.

The question presented by this certificate brings before this Court a controversy of great importance both to the government and to many importers, and an answer in the affirmative would necessarily have far reaching consequences.

For many years this Court, the Treasury Department, the Attorney General and importers, have understood, said and believed that amounts accruing as this amount accrued, were

penalties; great sums of such amounts thus accruing have been treated as penalties and have been remitted as such, and none of those sums so remitted have ever been paid into the Treasury.

The present attitude of the United States however, as shown in this case, is that such amounts are not penalties, but are merely ordinary customs duties or imposts.

They must necessarily be one or the other; there is no middle ground. There is no such thing known properly to the law as a "penal duty;" no statute imposes a penal duty, nor, indeed, could there be such a "duty" under the Constitution.

If, then, the United States is correct in its contention that they are merely "duties," it necessarily follows that all the remissions which have heretofore been made of such amounts were absolutely void; that those sums, so attempted to be remitted, are still due and owing to the United States; that those amounts can be recovered by the United States; that those importers who have been, and are now resting secure in the belief that their accounts with the Government are settled, are, nevertheless, still liable to pay; for it requires no argument to show that no statute of limitation will prevent such a recovery, and no erroneous action on the part of any collector of customs or any Secretary of the Treasury in remitting these sums, can bind the United States.

On the other hand, if the sums be penalties, as is here urged by the plaintiff in error, and as has been repeatedly held by this Court, then they were properly remitted, and no such unfortunate consequences as above indicated need follow.

In support of the contention of the plaintiff in error, reference will be had not only to the statute

itself, but to many decisions of this Court, as well as inferior Federal Courts, to the opinions of learned Attorneys General, and to the practice of the Treasury Department for many years.

POINT ONE.

The United States Circuit Court has no jurisdiction of an action to recover penalties arising under the customs laws.

U. S. Revised Statutes, Section 629.
U. S. Revised Statutes, Section 563.
United States vs. *Mooney*, 116 U. S., 104.
Lees vs. *United States*, 150 U. S., 476.

Section 629 of the Revised Statutes of the United States provides as follows:

> "Section 629. The Circuit Courts shall have "original jurisdiction: * * *
>
> "Fourth. Of all suits at law or in equity, "arising under any act providing for revenue "from imports or tonnage, * * * *except* "*suits for penalties* and forfeitures."

Section 563, R. S., also provides:

> "Sec 563. The District Courts shall have "jurisdiction as follows: * * *
>
> "Third. Of all suits for penalties or for- "feitures incurred under any law of the United "States."

United States vs. Mooney (116 U. S. 104) is directly in point and is controlling, even if there were any doubt about the meaning of the language

of the sections of the Revised Statutes above quoted. That was an action at law brought in the Circuit Court to recover of the defendant $20,000, the value of certain merchandise imported by him, which it was alleged he had forfeited because he had made an entry of the same by means of false and fraudulent invoices.

The defendant moved to dismiss the suit for want of jurisdiction to entertain it; the motion was granted and the United States appealed to the United States Supreme Court.

Upon the appeal the United States conceded that the exclusive jurisdiction of all suits for penalties and forfeitures under the customs laws of the United States continued in the District Courts until the passage of the Act of March 3, 1875, and that it still so continued, unless that act gave concurrent jurisdiction of such suits to the Circuit Courts.

The Supreme Court, after quoting the language of the Statutes from 1789 to the time of the passage of the Revised Statutes, and the Act of March 3d, 1876, and calling attention to the fact that for over eighty-six years there had been no question but that the District Court had exclusive jurisdiction over an action to recover all penalties (except where jurisdictions had been given to the Circuit Courts in special cases) said:

> "The Act of 1875, it is clear, was not intended to interfere with prior statutes conferring jurisdiction upon the Circuit or District Courts in special cases and over particular subjects.
>
> Its purpose was to give the Circuit Courts a jurisdiction which the Federal Courts did not then possess * * * * and not to take away from the Circuit or District Courts jurisdiction conferred by prior statutes, or to divide the jurisdiction which had for so long

a time been vested exclusively in the District Courts.

Thus construed there is no conflict between Section 1, of the Act of March 3, 1875, and Section 9 of the Act of 1789, which conferred exclusive jurisdiction on the District Courts for penalties incurred under the laws of the United States. The latter section, however, except as modified by statutes conferring jurisdiction upon the Circuit Courts in special cases, still remains in force, and the Circuit Court was right in dismissing the case for want of jurisdiction."

So also in *Lees vs. United States* (150 U. S. 476) decided in 1893, the Supreme Court held:

"From the earliest history of the Government the jurisdiction over actions to recover penalties and forfeitures has been placed in the District Court.

"It is true that in some cases jurisdiction over matters of penalty and forfeiture has been committed to the Circuit Court, but this was always done by special Act, and does not otherwise affect the proposition that the general jurisdiction over actions for penalties and forfeitures has been and is vested in the District Court. Hence, when, as here, a statute imposes a penalty and forfeiture, jurisdiction of an action therefor, would rest in the District Court, unless it is in express terms placed exclusively elsewhere."

The Court also cited U. S. vs. Mooney, with approval.

There is no special statute giving the Circuit Court jurisdiction of an action to recover a penalty arising under the customs laws.

If therefore, this is a suit for a penalty, it is a suit of which the District Court alone has jurisdiction, and over which the Circuit Court has no jurisdiction.

POINT TWO.

The "further sum," levied under the provisions of Section 7, of the Act of June 10, 1890, is a penalty, arising under the customs revenue laws; it is not a customs duty.

Section 7, Act of June 10th, 1890.
Section 32, Act of July 24th, 1897.
Greely vs. Thompson, 10 How., 225.
Maxwell vs. Griswold, 10 How., 242.
Bartlett vs. Kane, 16 How., 263.
Ring vs. Maxwell, 17 How., 147.
Stairs vs. Peaslee, 18 How., 521.
Passavant vs. United States, 148 U. S., 214.
20 Opinions Attorney-General, 660.
4 Opinions Attorney-General, 183.

(*a*) Section 7, of the Act of June 10, 1890 (26 Stat. at Large, 131), after providing that the importer of merchandise, shall make and verify his entry at the Custom House, setting forth the true market value, directs that the collector shall cause the merchandise to be appraised; it then provides:

> "And if the appraised value of any article "of imported merchandise shall exceed by "more than ten per cent. the value declared "in the entry, there shall be levied, collected "and paid, *in addition to the duties imposed "by law* on such merchandise, *a further sum*, "equal to two per cent. of the total appraised "value for each one per cent. that such ap- "praised value exceeds the value declared in "the entry."

The duty imposed by law on wood pulp was, at that time, ten per centum, *ad valorem* (paragraph 303, Act of August 28, 1894).

Therefore, under the provisions of existing law, the United States was entitled to demand and receive from Helwig, ten per centum of the value of the wood pulp which he had imported, and it had a lien upon the merchandise for that amount *but no more;* it had a claim against Helwig personally for that amount, *but for no more;* if Helwig paid the ten per centum "duty" imposed by law, he discharged fully the lien and claim, and thereupon became entitled to the immediate and absolute possession of the goods.

The statement of facts, contained in the certificate, shows that the valuation of the merchandise in question was $16,792.00 (page 2, folio 3); the duties imposed by law thereon amounted to $1,679.20, and no more; Helwig had paid $1,325.20 on account of those duties (page 2, folio 3), thereby leaving a balance of $354.00 due to the United States as duties, payment of which sum would, of course, discharge all liens and claims of the United States for "duties" on those particular importations; had the collector failed to deliver them upon payment he would have been liable for conversion. (*Conrad vs. Pacific Insurance Co.*, 6 Peters, 278, at 281.)

The reason why Helwig did not pay the $354.00 on entry was because he valued his merchandise in his invoices at less than the appraising officers subsequently valued it; but no matter what the value may be, the *duty* was ten per centum *ad valorem* and no more; therefore the only "duty" to which the United States was entitled, in addition to what had been paid, was the sum of $354.00, and that sum has since been duly paid (page 2, folio 3.)

In addition, however, to the *duties* imposed by law upon the merchandise the statute declares that "a further sum" shall be imposed, in certain cases

where it shall be found that there has been an undervaluation of the imported merchandise.

That "further sum" so imposed "in addition to the duties imposed by law," becomes due only when there has been some wrongful act of the importer; it is only levied when it appears that he has falsely stated the dutiable value of the goods which he has imported; its manifest purpose is to deter or prevent importers from under-stating the value of their goods, and to punish them if they attempt in that manner to evade the *duties* imposed by law; it is the "compensation of a violated law" (*Bartlett vs. Kane*, 16 How., 263).

A "penalty" has been defined to be "the punishment inflicted by a law for its violation" (*Bouvier*, "*Penalty*"). In this particular case it is conceded that technically Helwig violated the law, in that he failed to declare the value of his merchandise at the value which the Government appraisers subsequently declared to be the correct value; in so doing he omitted to pay $354 00 of the duties imposed by law on wood pulp. Therefore, under the statute, he is to be punished because of his violation of the law, and that statute declares that his punishment shall be that he must pay *in addition to the duties imposed by law*, the sum of nine thousand and sixty-seven dollars and sixty-eight cents. He must pay "a further sum" of over two thousand five hundred per centum of the amount of duties which it is alleged he sought to evade by undervaluation.

Manifestly, this enormous sum is not a "duty"; it is not imposed as such, nor does it possess any of the characteristics of a duty. It is not a fixed tax levied upon imported goods, but it is more or less an elastic fine levied in addition to the fixed tax. It is not imposed for purposes of revenue, nor for protection of home industries. It is a

sum which may never become due, although goods are constantly being imported, because all such importations may be correctly valued, and, therefore, be liable only to the uniform fixed burden imposed upon them by law. It is not fixed or determined except by the degree of culpability of the importer; the greater the percentage of his undervaluation, the greater the amount of the "further sum" which he must pay in addition to the duties. If that degree of undervaluation shall exceed forty per centum, then

> "the entry may be held to be presumptively fraudulent, and the collector of customs may seize the merchandise and proceed as in cases of forfeiture for violation of the revenue laws.
>
> "And in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence" (Section 7, *supra*).

This statute provides three methods or forms of punishment for a particular violation of law, measuring the degree of punishment according to the culpability of the offender.

The *offense* is the undervaluation of imported merchandise. The *punishment* is:

> (*a*) If the undervaluation be under 40 per centum, the offender must pay a sum of money; if he show the absence of willful negligence or intent to defraud, the Secretary of the Treasury may remit;
>
> (*b*) If the undervaluation be more than 40 per centum the goods may be seized and for-

feited, and the fact of the undervaluation is presumptive evidence of fraud; and unless he rebut the presumption by sufficient evidence, forfeiture shall be adjudged;

(*c*) If the undervaluation be knowingly and willfully made, the offender shall be punished by a fine of $5,000 or by imprisonment for two years, or both (Sections 6 and 9).

Here Congress has devised a plan of graded punishments for a specific kind of an offense, ranging from a mere amercement, to loss of goods or their value, and finally to imprisonment.

Can it reasonably be said that the nature of the wrong varies in the three cases mentioned? Is not the wrongful act the same throughout?

Can it reasonably be said that in (*a*) the punishment is merely the exaction of an "extra" or "additional" customs duty or impost or tax, while in (*b*) and (*c*) we enter the field of crime and punishment for crime?

The dividing line between (*a*) and (*b*) is so slight that it seems most unreasonable to say that in one case we have a crime and in the other merely the imposition of a tax. There can be no distinction in principle between an undervaluation of thirty-nine per centum, or less, and forty per centum or more. Yet it is the law that in the former case the offender pays a sum of money; in the latter his entry is presumptively fraudulent and his goods must be forfeited, unless he rebut the presumption; *and it is merely one per centum variation in the amount of the undervaluation that changes the form of the punishment.* But can that one per centum variation also change the character of the offense? May that slight difference in percentage determine whether the importer is merely called upon to pay an extra tax, or that

he is called upon to prove himself or his goods guiltless of a crime?

The case is analogous to the distinction which exists, under many state statutes in respect to larceny; the punishment varies in *degree* according to the *amount* or value of the thing stolen; but the *wrong* is the same in either case. If, as under the New York statute, the *wrong* is petit larceny, the punishment may be a fine merely; but if grand larceny it must be imprisonment.

For purposes of illustration let it be assumed for the moment that Congress had fixed upon 35 per centum undervaluation, instead of 40 per centum, as the dividing line. In that event, according to the original appraisement in this case, Helwig's entries would have been presumptively fraudulent, and his goods would have been forfeited, unless he rebutted the presumption, because the undervaluation there shown was over 37 per centum while, according to the final re-appraisement, he would have been innocent of fraud, because the undervaluation was there shown to be only 27 per centum but in either case Helwig's *offense* was the same; the punishment only varied.

Nor is there any lack of proportion in respect to the punishments inflicted under (*a*) and (*b*) respectively. Under (*a*), in Helwig's case, the penalty amounts to 54 per centum of the value of his merchandise; if the undervaluation had been 40 per centum, the penalty would have been 80 per centum, but instead of exacting the penalty of 80 per centum, the United States under (*b*), would have seized the merchandise, or, in other words, would have taken 100 per centum of the value from Helwig.

Congress has, therefore, prescribed a harmonious scheme of punishments for this offense, graded

carefully to accord with the extent of the wrong done.

And it is to be borne in mind that *all* the forms of punishment mentioned are *in addition to the duties imposed by law* on the merchandise.

In respect to (*a*) the statute so expressly declares, and in respect to (*b*) it has been recently so held in the United States Circuit Court of Appeals for the Second Circuit (*Gray vs. United States, 113 Fed. Rep., 213, and Baldwin vs. United States, 113 Fed Rep., 217*).

The Act of June 10, 1890, imposes no duty on wood pulp; nor does it impose any duty upon any merchandise. It is entitled "An act to simplify the laws in relation to the collection of the revenue." It is an administrative law, and relates to the *collection* of the customs revenue. But it is manifest that, so far as the provisions above mentioned are concerned, as well as others, it is a penal statute, and the punishments which it prescribes for violation of its provisions are criminal or quasi-criminal in their nature.

> *Boyd vs. United States, 116 U. S., 616 at 634.*

(*b*) It needs the citation of no authority to support the proposition that no officer of the Government has power to remit nor to waive the collection of customs duties.

Yet within the period of seven years, commencing January 1st, 1891, and ending October 31st, 1897, the various Secretaries of the Treasury have remitted hundreds of thousands of dollars of the "further sums," which had accrued under the provisions of paragraph 7 of the Act of June 10, 1890; they have instructed collectors of customs at various ports not to collect those "further

sums"; they have advised importers that they need not pay those accounts, and, in fact, they have not been paid. In their annual reports to Congress the various Secretaries of the Treasury have set forth in detail the amounts which they have so directed not to be collected.

(See Annual Reports to Congress of the Secretary of the Treasury, for 1895, Table V., pages CLVII to CLXI; for 1896, Tables S, page CLVII; for 1897 Table P page CXLI.)

In fact the collection of one half of the sum for which judgment was rendered in this very case was waived by the Secretary of the Treasury, as has already been stated.

The exact amount of these "further sums" which had been thus levied "in addition to the duties imposed by law," and the collection of which had been waived by the Secretary of the Treasury, during the period to which reference is made above, was, as shown by the official reports above quoted, $682,967.71 (See Summary, Appendix II. of this brief).

And this was not all; for it appears by the report for the year 1896 that the Secretary omitted to include therein any of these "further sums" which had accrued on importations of sugar in addition to the duties imposed by law, and had been waived by him, so that the actual amount waived was much greater than that above stated.

If these "further sums" were duties, then by what authority did the Secretary of the Treasury decide that they need not be paid into the Treasury of the United States? If they were *duties*, why did not the President and Congress, when they received the report of the Secretary stating that he had waived them, inquire by what

right he, a mere administrative officer, presumed to direct that duties imposed by law should not be collected?

But if it be admitted that these further sums are penalties, then clearly the Secretary had the right to remit them, no matter how large the amount.

The Statute under which the Secretary derived his power of remission is Section 5292, Revised Statutes, which provides that:

> "Whenever any person who shall have incurred any fine, penalty or forfeiture or disability * * * by authority of any provisions of law for imposing or collecting any duties or taxes * * * shall prefer his petition to the Judge of the district in which such fine, penalty or forfeiture or disability has accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same may be mitigated or remitted, the Judge shall inquire in a summary manner into the circumstances of the case * * * and shall cause the facts * * * to be stated * * * and direct their transmission to the Secretary of the Treasury. The Secretary shall thereupon have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability or any part thereof, if, in his opinion the same was incurred without willful negligence, or any intention of fraud in the person incurring the same, and to direct the prosecution if any has been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just."

Section 5293, provides that the Secretary may

remit or mitigate a fine, penalty or forfeiture, in certain cases, without a petition having been first presented to the district court; for instance, where the amount is less than one thousand dollars, &c.

Sections 17 and 18 of the Act of June 22, 1874 (18 Stat. at Large, 186), known as the Anti-Moiety Act, are substantially the same as 5292 R. S.

Section 17 provides:

> "That whenever, for an alleged violation of the customs revenue laws, any person who shall be charged with having incurred any fine, penalty, forfeiture or disability, other than imprisonment * * * shall present his petition to the Judge of the district * * * &c.," then the summary inquiry shall take place.

Section 18 provides that the Judge may direct that the investigation take place before a United States Commissioner; then follows the provision as to the power of the Secretary:

> "To mitigate or remit such fine, penalty or forfeiture, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence or any intention of fraud in the person or persons incurring the same. * * * "
>
> Section 19 states that "It shall not be lawful for any officer or officers of the United States to compromise or abate any claim of the United States arising under the Customs Laws, for any fine, penalty or forfeiture incurred by a violation thereof. * * *
>
> *Provided, however*, that the Secretary of the Treasury shall have power to remit any fines, penalties or forfeitures, or to compromise the same, in accordance with existing law."

By these statutes Congress has committed to the discretion of the Secretary of the Treasury the power to remit or mitigate penalties, incurred under any law providing for imposing or collecting of any duties, &c., when, in his opinion, such penalties shall have been incurred without willful negligence or intention of fraud.

Therefore, it is manifest why it is that the hundreds of thousands of dollars of these "further sums," accruing under Section 7 of Act of June 10, 1890, have not been paid into the Treasury; because those "further sums" were *penalties* and not *duties*, and because the Secretary of the Treasury had power to remit and did remit those sums *as penalties*.

Clearly, then, if these "further sums," accruing "in addition to the duties imposed by law" be held to be *duties*, and not to be *penalties*, the Secretary of the Treasury who waived their collection, has himself violated the law; and as hereinbefore pointed out, the collectors of customs who have neglected or omitted to collect these sums, have also in their turn violated the law and they, or their bondsmen, are personally liable to the United States for the full amount of these sums of money which they have so neglected or omitted to collect; so also are all the importers personally liable to the United States for the amounts of these "further sums" which they have not as yet paid; for nothing is better settled than that the unlawful act or neglect of an officer of the United States does not bind the United States (*German Bank vs. United States, 148 U. S., at 579, and cases cited.*)

But if, as we contend, these sums are in fact penalties and not duties, then the Secretary was right in remitting them; no hardship to importers can result and it will be unnecessary to re-open the

transactions which both the Government and the importers have regarded as closed.

(*c*) It being manifest, therefore, that these "further sums" are *penalties*, and, as such, have been properly and legally remitted or mitigated under the provisions of R. S. 5292, and Sections 17 and 18 of the Act of June 22, 1874 (*supra*), it follows that they are also *penalties* under R. S. 563 and 629, under the well settled rule of construction that the Legislature will be presumed to have used words in their ordinary signification, unless the contrary appears, and that it will be presumed that a word is used in the same sense in different parts of the same act.

These "further sums" being penalties within the meaning of the remission sections of the Revised Statutes, they are also penalties within the sections which define the jurisdiction of the Circuit and District Courts; therefore, the Circuit Court has no jurisdiction of this action, but it should have been brought in the District Court.

(*d*) Before directing attention to the many adjudged cases which hold that these "further sums" are penalties, rather than duties, it is proper to note the distinction which exists between "duties" and "additional duties," as well as to point out that occasionally the last mentioned phrase has been applied improperly to these "further sums" now in question.

Custom duties are the taxes or imposts levied upon imported merchandise, and as such are required by the Constitution to be uniform throughout the United States (Section 8, Article 1). As is well known the custom is to embody in one act of Congress a great variety of merchandise, subject to a large number of different rates of "duty," and

the enacting clause of such acts usually declares that "there shall be levied, collected and paid," upon imported merchandise, "the rates of duty," specified in the accompanying schedules. These are the "duties" imposed, as that word is ordinarily understood.

It has frequently happened, however, that Congress has imposed, in addition to the ordinary "duty," a further or "additional" duty; that is to say a further uniform tax upon certain classes of merchandise, or goods coming from a particular place or in a particular kind of vessel, &c. These are the true "additional" duties. They are not levied nor do they accrue by reason of any neglect, omission or wrongful act of the importer, nor because of his failure to comply with any provision of law; they are in no sense a punishment, but are, on the contrary, uniformly levied and collected precisely as the regular duties are levied and collected. They are merely *additions* to the duties which have already been or are to be levied at the regular rates of duty prescribed by the various schedules.

The first imposition of this additional duty was in the Act of May 2d, 1792 (Section 4, 1 Stat. at Large, 259), which was an act for raising a further sum of money for the protection of the frontiers. It provided that after a date named,

> "there shall be levied, collected and paid in addition to the present duty thereupon, a duty of 2 1/2 per centum upon all goods, wares and merchandise (therein enumerated) which are now chargeable with a duty of five per centum *ad valorem*,"

and Section 14 of the same act (p. 362), provided

> "that the *additional duty* * * * specified

in the fourth section shall continue for the term of two years and no longer."

Other similar impositions of "additional duty" will be found in

Chap. XV, Laws 1797 (1 Stat. at Large, 533), where an "additional duty" was imposed on salt.

Chap. LXVI, Laws of 1800 (2 Stat. at Large, 84) which was an act entitled "An Act to lay *additional duties* on certain articles imported."

Chap. XLVI, Laws of 1804 (2 Stat. at Large, 291), which was an act to provide a fund to be used for the expenses, &c., in relation to the Barbary powers; this act provided for an additional duty of 2 1/2% *ad valorem*, and throughout Congress invariably refers to the "additional duty." This act was continued in force for a number of years by special acts to that effect.

Chap. CXII, Laws of 1812 (2 Stat. at Large 768), which was an act entitled "An Act for imposing *additional duties* upon all goods, wares and merchandise imported," &c. Section 1, provides "That an *additional duty* of one hundred per centum upon the permanent duties now imposed by law," &c., &c. Section 3, declares "That the *additional duties* laid by this act shall be levied and collected in the same manner, &c., &c., as the duties now in force."

So also, there is the familiar imposition of an additional duty of ten per cent. upon importations made in vessels not of the United States.

Laws of 1789, Chap. 2 (1 Stat. at Large, 26).

Laws of 1790, Chap. 39, Sec. 2 (1 Stat. at Large, 181).

Laws of 1794, Chap. 54, Sec. 4 (1 Stat. at Large, 392).

Laws of 1795, Chap. 17, Sec. 5 (1 Stat. at Large, 411).

And the imposition of the 10 per cent. additional duty upon goods imported from beyond the Cape of Good Hope.

Further citations of instances where Congress has used the words "additional duty" in their ordinary and proper meaning appear to be unnecessary. Enough has been shown to demonstrate that these "further sums" are in no sense "additional duties," nor "duties," and while Congress has the undoubted right to levy either, neither Congress nor the Courts nor the custom officers can make a penalty any the less a penalty, nor change its character as a punishment by describing it as an "additional duty" or as a "penal duty."

As has been said "the Supreme Court looked through the name at the substance of the thing, and found it to be still a penalty" (Opinion of Attorney General Olney, 20 Opinions, 660).

Authorities.

(*e*) In the foregoing it has been shown that the executive officers of the Government have regarded these "further sums" as penalties, and not as duties, and have acted accordingly; and that in so doing they were supported by reason and principle, as well as by the statute itself.

And there are many cases in the Supreme Court and in the Circuit Court which support that position.

A careful search of the reported cases has disclosed but one other instance where the United States has brought suit specifically for the "fur-

ther sum", imposed for undervaluation; *and in that case the suit was brought in the District Court.*

The reason for this scarcity of cases directly on this point is that heretofore the practice has been for the Collector to exact payment of the penalty, together with the increased duty, before delivering the goods; then the importer would bring his action to recover back the amount which he claimed had been improperly exacted.

United States vs. *Strauss* (55 Fed. Rep., 388), was an action against an importer to recover $348.-12, a penalty incurred under the provisions of Section 7 of the Act of June 10, 1890, and was properly brought by the United States Attorney in the *District* Court for the Southern District of Ohio.

The Court in directing judgment for the plaintiff on the ground that the defendant had taken none of the steps provided by law to secure a re-appraisal, said:

> "The surveyor assessed a *penalty* thereon in accordance with the provisions of Section 7 of the Act of June 10, 1890 * * * The *penalty* under this provision in this case is $348.12, being the amount sued for."

And whenever the Courts have had occasion to pass upon any question in connection with these further sums thus imposed for undervaluation they have been almost invariably termed "penalties;" sometimes "penal duty," but never a "duty."

Greeley vs. *Thompson*, 10 How., 225, was a case where the collector demanded and received over $6,600 as a penalty imposed upon the importer for undervaluation of certain iron. The importer paid the amount and then brought suit to recover

it back on the ground that the collector or appraiser had valued the merchandise improperly by taking the value at the time of exportation rather than at the time of procurement.

In the course of its opinion, this Court, in upholding the view of the importer and sustaining a judgment in his favor, said:

> "There is another objection in this case to the applicability of the Act of 1842, if construed to affix this *penalty* to an undervaluation of goods procured otherwise than by purchase." * * * "They thus appear to leave goods procured other ways than by purchase to the provisions of the Acts of 1823 and 1830, which do not at all affix the *penalty* here exacted. * * * Especially in a *penal* provision it could not seem judicious any more than legal, to extend it beyond the clear language of the Act. * * *
>
> The Government, too, could not suffer by the delay asked here, as they, in the meantime, would hold the goods unless the increased duties on the highest appraisal, *and the penalty* were paid to them."

Here the Court not only specifically terms the amount a penalty but states that the provision imposing it is a *penal* provision; and finally the Court most clearly distinguishes between the increased duty, due to the highest appraisal, and the penalty which results from the undervaluation.

In *Maxwell vs. Griswold*, 10 How., 242, the importer was not permitted to make an addition to his invoice in order to avoid the penalty provided by the 8th section of the Tariff Act of July 30, 1846 (9 Stat. at Large, 43), and, having paid the amount, brought his action to recover it back. In discussing the case the Supreme Court said:

> "The importer protested against this (the

action of the collector), but in order to avoid the *penalty*, under such a wrong appraisal adopted the following course:

"The importer knowing that this (failure to increase the valuation of his invoice) would subject him to a severe *penalty*, in order to avoid it, felt compelled to add to his invoice the amount. * * *

"He was unwilling to pay either the excess of duties or the *penalty*, and must be considered, therefore, as forced into one of the other by the collector. * * * "

The Court here keeps clearly in view the distinction between the increased (or excess) *duties* due to the increased valuation, and the further *penalty* which would accrue if it appeared that there was undervaluation.

Bartlett vs. Kane, 16 How., 263, is also an important authority on the proposition that these sums are not customs duties, but are penalties.

The Court there held that they could not be refunded as drawback upon the exportation of the merchandise, on the ground that the provision of law "for the return of the *duty* upon a re-exportation * * * does not include, in its purview, any return of the forfeitures or *amercements* resulting from illegal or fraudulent dealings on the part of the importer or his agents."

The facts there were that the merchandise had been advanced in value by more than ten per cent., thereby incurring the penalty or so-called "additional duty," provided by the 8th section of the Tariff Act of 1846 (9 Stats. at Large, at 74). The importer first filed an appeal against the appraisement and then withdrew it; he then paid under protest the increased duty and penalty for the undervaluation. Thereafter he exported a portion of the merchandise, and sought to obtain

a drawback not only of the increased duty, but of the penalty.

It will be observed that here, although the statute termed the amount an "additional duty," the Supreme Court ignored that fact, and looking at the substances rather than the form, held that it was not a duty but was an "amercement"; in other words, a penalty.

It is manifest, also, that had the so-called "additional duty" been really a duty, the importer under the then existing drawback laws would have been entitled unquestionably to a return of it, less the usual one per centum.

Passavant vs. *United States* (148 U. S., 214) arose under the act of 1890, and the Court there passed upon some of the provisions of that act to which reference has been made. The question involved was whether the Circuit Court had jurisdiction to review a decision of the Board of General Appraisers, as to the dutiable value of imported merchandise, and this Court held that such a decision was final and no review could be had, in the absence of fraud.

It was also claimed by the importers that the merchandise was not subject to the imposition of the "further sum" or so-called "additional duty," as provided by Section 7 (*supra*).

This Court held (page 221):

> "As stated by Mr. Justice Campbell, speaking for the Court, in Bartlett v. Kane, 16 How.,263, 274, such additional duties 'are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud.' They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. *It is wholly immaterial whether they are called additional duties or penalties.*

Congress had the power to impose them under either designation or character.

"When the dutiable value of the merchandise is finally ascertained to be in excess of the value declared in the entry by more than ten per centum, this extra duty or *penalty* attaches * * * in addition to the *ad valorem* duty provided by law. The importers in this case cannot be heard to complain of this additional duty or *penalty*. * * * "

The Court added that because the importers had received due notice of all the proceedings it could not properly be said that they had been subjected to *penalties* without notice, or had been deprived of their property without due process of law.

In a very large number of cases in the various Circuit Courts these "further sums" levied in consequence of undervaluation have been invariably called "penalties." Without referring to the details in each case, or to all of them, it is sufficient to cite the following:

Morris vs. Robertson, 37 Fed. Rep., 199.
Grinnel vs. Lawrence, 1 Blatch., 346.
Bannandahl vs. Redfield, 4 Blatch., 223.
Bischoff vs. Maxwell, 4 Blatch., 384.
Lehmaier vs. Maxwell, 15 Fed. Cases, 250 (not elsewhere reported).
Manhattan Gas Light Co. vs. Maxwell, 2 Blatch., 405.

In 1893 the Secretary of the Treasury requested the Attorney General for an opinion as to whether the "further sums" provided for by Section 7 of the Act of June 10, 1890, were penalties within the meaning of Sections 5292 and 5293 of the Revised Statutes and Sections 17 to 20 of the Anti-Moiety Act of June 22, 1874, Chapter 391 (20 Opinions Attorney General, 660).

After quoting from the various statutes in ques-

tion, Hon. Richard Olney, the learned Attorney General, says:

> "There is no doubt that if the 'additional 'duty' is a penalty, these provisions apply to the case, as they are to be construed as forming with the Act of 1890 one complete system of tariff legislation.
>
> On principle, it is clear that the so-called 'additional duty' is a penalty. It is not provided for the purpose of revenue. It is no less a penalty because proof of fraud or other willful misconduct is not a necessary preliminary to its infliction. It is in its essence a fine inflicted to promote honesty; nor is it less a penalty because it is called something else. The law looks at facts, not names. As will be shown, it was in fact called a penalty when it first appeared in the statute book. The results of the contrary construction would be most unreasonable and therefore to be avoided if possible. One result would be that the Secretary of the Treasury could remit when fraud was charged, otherwise not. If the increase of valuation on the appraisement amounts to 40 per cent. the goods may be seized for presumptive fraud, according to the express provisions of the law, and then the Secretary's power of remission attaches. If, however, the increase in valuation by the appraisement is between 10 and 40 per cent. only, then, according to the construction adopted by the Treasury Department, no seizure can be made unless there is some positive indication of fraud. If there are indications of fraud, there can be no remission, because there can be no seizure. Such intent should not be imputed to Congress except in a very clear case."

The learned Attorney General then proceeds to trace the history of the various statutes authorizing the imposition of this penalty and after an ex-

haustive analysis of the whole field of tariff legislation in respect to this question, he concludes:

> "I am therefore constrained to hold that, "being a penalty, it is subject to remission "like other fines, penalties and forfeitures."

(The full opinion from which the above quotations are made will be found in the Appendix to this brief.)

Moreover while the Act of 1842 was in force, the Secretary of the Treasury asked Attorney-General Legare whether he had power to remit the 50% penalty imposed by that Act.

The Attorney-General answered the question in the affimative (4 Opinions, 182) stating that he was "very clear that the 50 per cent. * * * was a penalty."

It has been shown that the Supreme Court, the Circuit Court, the Attorney General, the Secretary of the Treasury, have all directly and positively declared these sums to be penalties, and not to be duties, while we have also shown that the President and Congress have impliedly, at least, recognized and approved that proposition.

Therefore, it may be said, as was laid down by the Supreme Court in *Stairs vs. Peaslee* (18 How., 521, at 530):

> "And after that construction has been thus sanctioned, impliedly, in a judicial proceeding in this Court, *and acted on for so many years* (1846 to 1853) by all the parties interested, the Court thinks it ought to be regarded as settled and that what has been done under it ought not to be disturbed * * *."

It is necessary, however, to refer to the sole case where the contrary view was held by any of the Federal Courts.

United States vs. *Collier*, 3 Blatch., 325 (No. 14,833 Federal Cases), was an action involving the settlement of the accounts of Collier, who had been collector of Upper California from 1849 to 1851. The United States claimed that a balance of several hundred thousand dollars existed against Collier, who, in turn, claimed offsets for various reasons.

Among others he claimed that he was entitled to a moiety in the sum of $28,000, which he had collected as the twenty per centum additional duty arising under the provisions of the Act of 1846, upon undervaluation.

The Circuit Court, passing upon this claim, said:

> "We consider the case of Ring vs. Maxwell, 18 How., 147, as determining that the sum so demanded by the defendant did not accrue from fines or penalties, but was composed of duties chargeable by law on the merchandise imported."

This was the sole ground upon which the Circuit Court denied Collier's claim to a moiety; namely, that Ring vs. Maxwell was authority for the proposition that the 20% penalty was a duty and not a penalty.

But with all due respect to the Circuit Court, the case of Ring vs. Maxwell did *not* hold anything of the sort. The Supreme Court there held that the 20% was not a penalty, *for the purpose of being distributed among the officers of customs*, and it so held *because* the Act of 1846 expressly declared that the 20% *should not be construed to be a penalty for the purpose of distribution.*

The Supreme Court there held:

> "We do not find it necessary to determine whether these additional duties might have been deemed penalties, so as to come under

> the terms of either of the collection laws, which have directed the distribution of penalties among certain officers of the customs * * *.
>
> Because in our opinion *whatever may be the nature of the sums levied*, as additional duties, under the 8th section of the tariff act of 1846, they are not distributable as penalties."

The Court then proceeds to point out that Section 17 of the Act of 1842 first provided for a penalty of fifty per centum for undervaluation; that Section 26 of the same Act provided for the distribution, collection, remission, etc., of those penalties, in accordance with existing law; that the 8th Section of the Act of 1846, which imposed a 20% penalty, was a substitute for the 17th Section of the Act of 1842; and that the 26th Section of the Act of 1842, being still in force, the argument that the 20% penalty was distributable, had "great force" (page 149).

The Court adds that it

> "accedes to the position * * * that whatever rule was in force when the Act of 1846, was passed, concerning the distribution of the additional duty levied by the 17th section of the Act of 1842, is also in force and applies to the additional duty under the 8th section of the Act of 1846, which is here in question. So that the only remaining inquiry is, what was that rule?"

The Court then states that the question is answered by the provisions of the 3d section of the Act of February 11, 1846 (9 Stats. at Large, 3), which contained the express provision

> "that no portion of the additional duties provided for by the 17th section of the Act of August 30, 1842, entitled, &c., shall be

deemed a fine, penalty or forfeiture, *for the purpose of being distributed to any officer of customs;* but the whole amount thereof, when received, shall be paid directly into the Treasury."

The Court then points out that as this rule was in force at the time the Act of 1846 was passed, it necessarily follows that the sums in question were not distributable. In conclusion the Court adds:

> "The fallacy of the argument, on the part "of the complainants, consists in going back "to former laws concerning the distribution of "*other* penalties, and considering them to be "applicable to *this penalty*, when the exist- "ing law applicable in terms to a penalty "*ejusdem generis*, and for which *this penalty* "is a substitute, declares that it is not dis- "tributable (p. 151).

All that was decided in Ring vs. Maxwell, therefore, was that the amount in question was not a penalty for a particular purpose, *because* the existing statute expressly declared that it should not be deemed a penalty for that purpose.

But it was by no means held that it was not a penalty for any other purpose; nor was it held that it was a duty. On the contrary, as appears by the language above quoted, the Court clearly and emphatically recognizes it to be a penalty; over and over again calls it a penalty; compares it with other penalties, and points out that it would be within the law in relation to *other penalties of the same kind*, if it were not for the express provisions of the statute to the contrary.

Moreover it will be noted that the Court expressly holds that the sum in question is a penalty in so far as the laws for the collection, recovery and remission of penalties is concerned, but that so far as the distribution is concerned, it is ex-

cluded from those laws, because of the statute quoted; the Court states (p. 150):

"It is obvious that it must have been intended that those existing laws should be thus applied; and this can only be effected by considering the duties and *penalties* levied by the Act of 1846, as substitutes for and to be governed by the same rules, as the corresponding duties and *penalties* levied by the Act of 1842, which did, in terms, adopt and apply the existing laws for the recovery, collection and distribution of duties *and penalties*."

It is equally plain that the rule of *expressio unius est exclusio alterius* was in the mind of the Court, and that as a consequence of this rule the direction of Congress that this amount should not be deemed a penalty for a particular purpose, clearly implied that it should be considered a penalty for all other purposes.

(*f*) Although the Tariff Act of 1897 has no direct bearing on this case, having been passed after these importations were made, it is proper to note some of its provisions, particularly in view of the rule laid down in Ring vs. Maxwell. Section 32 of the Act of 1897 amended Section 7 of the Act of June 10, 1890, as follows:

> "And if the appraised value of any article of imported merchandise subject to an *ad valorem* duty * * * shall exceed the value declared in the entry, there shall be levied, collected and paid, *in addition to the duties imposed by law* on such merchandise, *an additional duty* of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the *additional duties* shall only apply to the particular article or articles in each invoice that are so undervalued, or shall be limited to fifty per centum of the appraised value of such article or articles."

Thus far the Act of 1897 is substantially the same as the similar provision in the Act of 1842, Section 17, and the amount of the penalty is again reduced to the maximum of fifty per centum; again does Congress term this amount an "additional duty;" but again we must look to the substance rather than the form and see that it is still the same *penalty* that was before the Supreme Court in Ring vs. Maxwell and the other cases above cited.

But Section 32 then proceeds to lay down an additional and new rule in respect to these so-called additional duties which may thereafter accrue. Having declared in 1842 that a similar provision should not be deemed to be a penalty for the purpose of distribution among customs officers, Congress now proceeds to declare that these sums shall not be construed to be penalties *for the purpose of remission*, except in cases of manifest clerical error.

Section 32 further provides that:

> "Such additional duties shall *not be con-*
> "*strued to be penal, and shall not be remitted*,
> "nor payment thereof in any way avoided,
> "*except in cases arising from a manifest*
> "*clerical error*, nor shall they be refunded in
> "case of exportation of the merchandise, or
> "on any other account, nor shall they be sub-
> "ject to the benefit of drawback. * * *"

The language used clearly indicates that Congress recognized the fact that these sums were penalties, because it provided that they shall not be remitted, and, as has been shown, no duty could be lawfully remitted; no statute authorizing remission of *duties* was or is in existence. But being *penalties*, then, of course, they are within the remission statutes—and may be remitted, unless Congress expressly declares that they may not be remitted.

Congress thereupon reduces the penalty by one-half, as compared with the prior act, but declares that the so-called additional duties shall not be construed to be penal, shall not be remitted, nor shall they be refunded by way of drawback upon exportation.

All these restrictions and limitations are undoubtedly within the power of Congress. It might well say that no forfeiture, no fine or no penalty might be remitted under any circumstances; but that would not change the character of the fine, or the penalty or the forfeiture; in each case it would be precisely the same as before. If Congress were to declare that no one might be pardoned for an offense committed, it would not alter the fact that an offense had been committed, nor would it change the name or description either of offense or punishment.

So under the Act of 1897, while Congress has the power to say that the penalties shall not be remitted nor payment in any way avoided, nor refunded, the exercise of such power does not and cannot change in any way the essential character of the thing; it is still a penalty; it is still a punishment inflicted for the violation of the law; it is still *not* a duty, and Congress cannot make it a duty by terming it an "additional" duty, any more than it could by calling it a "supplemental" or "extra" duty. That which is by its very nature a *fine* inflicted for violation of law cannot be any the less so because it is called something else.

In conclusion, while it is not directly involved in the question certified, it is important to note that in this very case the Secretary of the Treasury, as hereinbefore mentioned, actually remitted one-half of this particular penalty. It is true that

subsequently he sought to revoke his decision, because it had become necessary to sue Helwig for the unremitted portion of the penalty; but that does not in any way effect his original decision that it was a penalty; in fact, it emphasizes the view of the Treasury Department that the sum was one which was within the statute affecting penalties.

At the proper time and place and in a Court which has jurisdiction of this action, it can very properly be urged that the decision of the Secretary necessarily found that the penalty was incurred without wilful negligence or intent to defraud, and that decision *ipso facto* remitted the entire amount. It can there also be urged that the subsequent attempt by the Secretary to "revoke" that finding and decision, merely because it had been found to be necessary to sue Helwig for the half of the penalty, not specifically remitted, was entirely void. Were this not so, a decision of the Secretary of the Treasury remitting penalties would have no value whatever, as he might at any time and for any reason, however arbitrary and whimsical, "revoke" it; had Helwig paid the $4,533.84, the Secretary might even then, had he so pleased, have revoked his decision and called upon Helwig to pay the balance.

But these are questions which are pertinent in an action begun in a proper Court, rather than in respect to the question certified.

POINT THREE.

The question of the United States Circuit Court of Appeals should be answered in the negative.

HENRY W. RUDD,
Counsel for Plaintiff in Error.

APPENDIX.

I.

Opinion of Hon. Richard Olney, Attorney-General, holding that these "further sums" are penalties. (20 Opinions, 660.)

Department of Justice,

Washington, D. C., September 9, 1893.

Sir:—

I have given careful consideration to the questions raised by your communication of August 11, relating to the remission of penalties by the Treasury Department. I understand that you desire no opinion as to the case of the Madison Square Garden Company. This leaves two questions to be answered.

First. The first question you ask is whether the so-called "additional duties" provided for by Section 7 of the Customs Administrative Act of June 10, 1890, Chapter 407, are penalties within the meaning of Sections 5292-3 of the Revised Statutes and Sections 17 to 20 of the Anti-Moiety Act of June 22d, 1874, Chapter 391.

Although this question was substantially decided in the affirmative by the Attorney General under prior acts of like import as long ago as 1843, yet recent rulings of the Secretaries of the Treasury have been to the contrary, supported by an opinion of the Solicitor of the Treasury rendered in 1886. While these rulings have not established a practice so continuous as to govern the statutory construction, yet, as I adhere to the opinion expressed by my predecessor, they call for a more extended discussion of the subject than is usual in opinions rendered by this Department.

Section 7 of the act of 1890 provides as follows:

"And if the appraised value of any article of imported merchandise shall exceed by more than ten per cent. the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per cent. of the total appraised value for each one per cent. that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry more than forty per cent., such entry may be held to be presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws."

The sections above cited from the Revised Statutes and the Anti-Moiety Act of 1874 provide procedure by which "any fine, penalty or forfeiture" may be remitted in a proper case by the secretary of the treasury. This system of remission has come down with some changes of detail from the Act of March 3, 1797, Chapter 13. The power of remission applies by Section 5292 of the Revised Statutes to "any person who shall have incurred any fine, penalty, forfeiture or disability * * * by authority of any provisions of law for imposing or collecting any duties or taxes;" * * * by Section 5293 to "a fine, penalty or forfeiture;" by Section 17 of the Act of 1874 to "any person who shall be charged with having incurred any fine, penalty, forfeiture or disability other than imprisonment." The Act of 1797, under which the opinion of my predecessor above referred to

was given, relates to "any person or persons who shall have incurred any fine, penalty, forfeiture or disability * * * by force of any present or future law of the United States for the laying, levying or collecting any duties or taxes." * * * There is no doubt that if the "additional duty" is a penalty, these provisions apply to the case, as they are to be construed as forming with the Act of 1890 one complete system of tariff legislation.

On principle it is clear that the so-called "additional duty" is a penalty. It is not provided for the purposes of revenue. It is no less a penalty because proof of fraud or other wilful misconduct is not a necessary preliminary to its infliction. It is in its essence a fine inflicted to promote honesty; nor is it less a penalty because it is called something else. The law looks at facts, not names. As will be shown, it was in fact called a penalty when it first appeared in the statute book. The results of the contrary construction would be most unreasonable, and, therefore, to be avoided if possible. One result would be that the Secretary of the Treasury could remit when fraud was charged, otherwise not. If the increase of valuation on the appraisement amounts to 40 per cent., the goods may be seized for presumptive fraud, according to the express provisions of the law, and then the Secretary's power of remission attaches. If, however, the increase in valuation by the appraisement is between 10 and 40 per cent. only, then, according to the construction adopted by the Treasury Department, no seizure can be made unless there is some positive indication of fraud. If there are indications of fraud, a seizure can be made, followed by a remission. If there are no indications of fraud, there can be no remission, because there can be no seizure. Such intent

should not be imputed to Congress except in a very clear case.

It now remains to trace the history of the statutory provisions and consider decisions of the Courts and the opinions of the Attorneys-General under the language of the older statutes.

The "additional duties" of the Act of 1890 originated as early as the Act of April 20, 1818, Chapter 79. Section 11 of that act, after providing for appraisal of goods subject to *ad valorem* duties on suspicion of undervaluation, enacts that "if the value at which the same shall be appraised shall exceed by twenty-five per cent. the invoice prices thereof, then in addition * * * there shall be added fifty per cent. on the appraised value on which aggregate amount the duties on such goods, wares and merchandise shall be estimated." In this and other early acts the penal duty was arrived at by the method of enlarging the basis on which the *ad valorem* duty was computed, not as now by simply increasing the percentage of the duty.

Section 25 of this act enacted "That all *penalties and forfeitures* incurred by force of this act shall be *sued for*, recovered, *distributed* and accounted for in the manner prescribed by" the Act of March 2, 1799, "and may be *mitigated or remitted* in the manner prescribed by" the Act of March 3, 1797. Attorney-General Wirt, in his opinion of February 19th, 1821 (5 Op., 730), ruled that the 50 per cent. could not be remitted; but this was because he thought Congress to have "confined the mitigating and remitting power of the Secretary of the Treasury to such penalties and forfeitures as are, according to the provisions of the act, to be recovered *by suit*." This construction would have prevented the distribution of moieties out of this 50 per cent. among the

customs officers; it seems either to have been retracted or disregarded, with the subsequent approval of the Supreme Court (Bartlett v. Kane, 16 How., 263, 274).

The act of March 1, 1823, Chapter 21, Section 13, repeated the language quoted from Section 11 of the former act, adding the following words: "*Provided*, That nothing herein contained shall be construed to impose *the said penalty of fifty per cent.* for a variance between the *bona fide* invoice of goods produced in the manner specified in the proviso of the fifth section of this act and the current value of the said merchandise in the country where the same may have been originally manufactured or produced." The fifth section referred to "*the penalty* provided for in the thirteenth section of this act."

The Tariff Act of May 19, 1828, provided in Section 8 for an appraisal in all cases of goods subject to *ad valorem* duties, or to any other duties regulated according to the value of the article, and enacted in Section 9, that where the appraised value "shall by ten per cent. exceed the invoice value thereof, in addition to the duty imposed by law on the same, if they had been invoiced at their real value, as aforesaid, they shall be levied and collected, on the same goods, wares and merchandise; fifty per cent. of the duty so imposed on the same goods, wares and merchandise when fairly invoiced; *Provided, always*, That nothing in this section contained shall be construed to impose the said last mentioned *duty of fifty per cent.* for a variance between the *bona fide* invoice of goods produced in the manner specified in the proviso to the eighth section of this act, and the current value of the said merchandise in the country where the same may have been originally manufactured or produced; *and*

further, that the *penalty of fifty per cent.* imposed by "the Act of 1823" shall not be deemed to apply or attach to any goods, wares or merchandise which shall be subject to the additional *duty of fifty per cent.*, as aforesaid, imposed by this section of this act."

It will be noticed that this first proviso is substantially a copy of the proviso in the act of 1823, only changing the word "penalty" to "duty," but that in referring to the former act it still retains the word "penalty." The change of the wording was probably made, in accordance with the extreme high tariff policy of the framers of this famous act, to prevent a strict construction in favor of the importer. This purpose failed, as we shall see, if it ever existed, for the Supreme Court looked through the name at the substance of the thing, and found it to be still a penalty, as unconsciously confessed by the legislators in this second proviso.

The tariff act of August 30, 1842, Chapter 270, Section 17, repeated the language of Section 9 of the act of 1828, but without the provisos. By Section 26 prior laws as to "the recovery, collection, distribution and remission of all fines, penalties and forfeitures," were continued as if re-enacted.

It was under this act that the opinion of Attorney-General Legare was asked by the Secretary of the Treasury whether he had power to remit the 50 per cent. as a penalty within the meaning of the act of 1797. This question was answered in the affirmative on June 7, 1843 (4 Op., 182), the Attorney-General stating that he was "very clear that the 50 per cent. * * * is a penalty."

The "act relative to collectors and other officers of the customs" of February 11, 1846, Chapter 7,

impliedly recognized the correctness of this opinion by providing that "no portion of the additional duties provided by" the act of 1842, Section 17, "shall be deemed a fine, penalty or forfeiture *for the purpose of being distributed to any officer of the customs*, but the whole amount thereof, when received, shall be paid directly into the Treasury."

The Tariff Act of July 30, 1846, Chapter 74, Section 8, after providing for entry and appraisement of imported goods, enacted that "if the appraised value thereof shall exceed by ten per cent. or more the value so declared on the entry, then in addition to the duties imposed by law on the same, there shall be levied, collected and paid a duty of twenty per cent. *ad valorem* on such appraised value." This Act was held not to repeal the administrative provisions of customs laws not expressly re-enacted (Ring v. Maxwell, 17 How., 147).

In Greely v. Thompson (10 How., 225) and Maxwell v. Griswold (*id.*, 242) a strict construction was placed by the Supreme Court on these provisions of the Acts of 1842 and 1846, respectively, on the ground that they were penal in nature. In Bartlett v. Kane (16 How., 263, 274), the Court called the twenty per cent. under the latter Act an "amercement," and held that, not being a duty in the true sense of the word, its return could not be demanded upon re-exportation. Speaking of these "additional duties," Mr. Justice Campbell said that "they were enacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts this additional duty has been distributed among officers of the customs upon

the same condition as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty" (see also Ring v. Maxwell, 17 How., 147) 150–1; Stairs v. Peaslee, 18 *id.*, 521, 527–529; Belcher v. Lawrason, 21 *id*., 251, 256; Tappan v. United States, 2 Mason, 393, 402; Swanston v. Morton, 1 Curt., 294; Kriesler v. Morton, 2 *id.*, 239; 17 Op., 268; *id.*, 436).

The Act of June 30, 1864, Chapter 171, Section 23, in terms re-enacted the provision above quoted from the Act of 1846, and Section 22 continued all existing laws. Section 23 was repealed, but re-enacted in this particular, by the Act of March 3, 1865, Chapter 80, Section 7, and its language was incorporated in Section 2900 of the Revised Statutes, which remained the law until the enactment of the Customs Administrative Act of 1890, now in question. Under the latter, as under its predecessors, the so-called "additional duty" is recognized by the Supreme Court to be a penalty (Passavant v. United States, 148 U. S., 214, 218, 221, 222).

I am, therefore, constrained to hold that, being a penalty, it is subject to remission like other fines, penalties and forfeitures.

Second. The second question presented by you relates to the seizure of the paintings of Mr. E. Roberts for alleged undervaluation. It appears that Mr. Roberts had paid duties upon part of his importation and entered the remainder free as "antiquities." After the seizure the importer failed to take the proceedings provided for the case of persons dissatisfied with the appraisement or classification of their merchandise. Instead, he brought a proceeding under Section 5292 of the Re-

vised Statutes and the Act of 1874 for a remission of the forfeiture. A summary investigation was had before a United States commissioner, who certifies the evidence to you, and finds that the pictures entered as "antiquities" were entitled to free entry as such, and that the value of the other articles as declared in the invoice is greater than their true market value in the country of production. You ask to be advised as to the weight and effect of this proceeding and of the findings of the commissioner, and as to any action which it is incumbent for you to take under the circumstances. I can only answer this question so far as it relates to your power to remit in the premises.

I do not understand that you question your own power to remit the forfeiture upon payment of the proper duties as estimated upon the appraised value of the pictures. Your doubt concerns the right to remit also in this proceeding the difference between the duties actually paid at the time of importation, and the duties as they would be assessed were the appraisement and classification by the custom house authorities assumed to be correct. It is evident that such a remission would be equivalent to a reappraisement by a United States commissioner and the Secretary of the Treasury, instead of in the manner provided by the Customs Administrative Act. Were such a practice established, importers would substantially have a choice of forum. They could appeal either to the Board of General Appraisers, or to yourself, through the United States commissioner, in remission proceedings. I do not think that any such position is tenable. The sums assessed by the custom house authorities (exclusive of the amercement under Section 7 of the Customs Administrative Act) are in no sense penalties, but are duties in the strict sense of the term, however erroneously ar-

rived at. I therefore advise that you have the power to remit the forfeiture, but only on payment of the duties as so estimated.

Very respectfully,

Richard Olney,
Attorney-General.

The Secretary of the Treasury.

II.

Extract from "Table V, Penal duties remitted by the Secretary of the Treasury, since January, 1891, under Sections 5292 and 5293 Revised Statutes, as amended by Sections 17, 18 and 19 of the Act of June 22, 1874."

(Report for 1895, Table V, pages CLVII to CLXI.)

The table mentioned which covers several pages of the report, states the port, the nature of the merchandise, the date of remission and the amount remitted. At page CLXI is found the following:

Recapitulation.

Port	Amount	Number of Cases.
New York, N. Y.	$181,809.91	239
Buffalo, N. Y.	567.00	2
Chicago, Ill.	38,832.70	29
Detroit, Mich.	337.50	1
Philadelphia, Pa.,	4,951.12	7
Pittsburg, Pa.,	1,140.48	1
San Francisco, Cal.	179.35	1
St. Louis, Mo.	1,836.78	3
Boston, Mass.	5,765.04	19
Springfield, Mass.	1,282.61	2
	$236,702.49	304

Extract from "Table S, Penal Duties remitted by the Secretary of the Treasury, since January 1, 1896, under Sections 5292 and 5293, Revised Statutes, as amended by Sections 17, 18 and 19 of the Act of June 22, 1874."

Remissions on sugar not included, the Courts having decided that penal duties do not accrue on sugar invoiced conditionally.

(Table S, pages CLIV to CLVII, Report for 1896.)

At page CLVII, is found the following:

Recapitulation.

Port	Amount	Number of Cases
New York, N. Y.,	$79,528.92	138
Baltimore, Md.,	8,933.50	3
Boston, Mass.,	6,659.68	23
Buffalo, N. Y.,	112,883.58	5
Chicago, Ill.,	1,211.04	3
Detroit, Mich.,	139.84	2
Eagle Pass, Tex.,	1,445.00	2
New Orleans, La.,	49,016.09	1
Philadelphia, Pa.,	2,690.06	7
	$262,507.62	184

Extract from "Table P, Penal Duties remitted by the Secretary of the Treasury from November 12, 1896, to October 31, 1897, inclusive, under Sections 5292 and 5293, Revised Statutes, as amended by Sections 17, 18 and 19, Act of June 22, 1874."

(Table P, pages CXLI to CXLIV, Report for 1897.)

At page CXLIV is found the following:

Recapitulation.

Port	Amount	Number of Cases.
New York, N. Y.,	$124,667.91	135
Boston, Mass.,	44,742.46	23
San Francisco, Cal.,	1,084.60	1
Bangor, Me.,	2,549.78	1
Chicago, Ill.,	1,936.32	6
St. Louis, Mo.,	1,422.30	6
Philadelphia, Pa.,	5,770.62	4
St. Paul, Minn.,	460.48	2
Buffalo, N. Y.,	414.89	2
Baltimore, Md.,	407.16	3
Cleveland, Ohio,	130.76	1
Houlton, Me.,	122.32	1
Cincinnati, Ohio,	48.00	2
	$183,757.60	187

Summary.

Report for 1895,	$236,702.49
Report for 1896,	262,507.62
Report for 1897,	183,757.60
	$682.967.71

No. 65.

Brf. of Attorney for D. C.

Filed Nov. 3, 1902.

Office Supreme Court U.S.
FILED
NOV 3 1902
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

RUDOLF HELWIG, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 65.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

The essential facts in this case are these: Helwig made three importations of wood pulp during the year 1895 and paid the regular duties on their invoiced valuation. The merchandise was subsequently appraised and found to have been undervalued by more than 10 per cent, whereupon there became due from the importer not only the regular duties upon the increased valuation, but also, under the provisions of section 7 of the customs administrative act of June 10, 1890, a "further sum" equal to 2 per cent of the total appraised value for each 1 per cent that the appraised value exceeded the value declared in the entry.

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Helwig paid the additional regular duties, but did not pay the "further sum." Suit was accordingly brought in the United States circuit court, where the case was tried on an agreed statement of facts, resulting in a judgment in favor of the United States. The plaintiff in error contended that the action was to recover penalties arising under the customs laws, and therefore that the circuit court had no jurisdiction. The action was taken from the circuit court on writ of error to the circuit court of appeals for the second circuit, which court now certifies the question of jurisdiction to this court for determination.

QUESTION.

Has the United States circuit court jurisdiction of an action to recover the aforesaid "further sum" accruing "in addition to the duties imposed by law," under the provisions of section 7 of the act of June 10, 1890, 26 Stat., 131? (Record, p. 3.)

ARGUMENT.

I.

The deliberate and continuing intention of Congress, as evidenced by the wording of the statutes themselves, including the latest legislation on the subject, is that these "additional duties" or "further sums" are to be considered and treated as duties and not as penalties.

It will be instructive to examine the language of prior acts relating to the levying of additional duties for undervaluation. The point to be borne in mind in the review of these statutes is not whether, in view of the restrictive tendency of these provisions, they might

not in the broadest sense of the term be considered as penalties, but in what light did Congress intend that they should be considered. Was it the intention of Congress that they should be treated as duties or as penalties?

Section 11 of the act of April 20, 1818 (3 Stat., 436), provided that where the appraised value of imported merchandise exceeded the invoice value by 25 per cent, then, "*in addition* to the 10 or 20 per centum * * * laid upon correct and regular invoices according to law, *there shall be added 50 per cent on the appraised value*," etc.

Section 25 of the same act provides:

> That all *penalties and forfeitures incurred by force of this act* shall be sued for, recovered, distributed, and accounted for in the manner prescribed in the act [of March 2, 1799, ch. 22, 1 Stat., 627] and may be mitigated or remitted in the manner prescribed by [the act of March 3, 1797, 1 Stat., 506].

Evidently this does not refer to the 50 per cent increase in the valuation of the articles undervalued. That was distinctly a duty and was to be collected as such. This is a penalty to be recovered by suit and to be distributed and accounted for accordingly.

Attorney-General Wirt held (5 Op., 731):

> It is very manifest that by the manner of wording the twenty-fifth section of this law they have confined the mitigating and remitting power of the Secretary of the Treasury to such penalties and forfeitures as are, according

> to *the provisions of this act, to be recovered by suit;* and consequently that his mitigating and remitting power does not extend to the 50 per cent which is, in certain cases, to be added to the appraisement, *because this is not to be recovered by suit.*

Undoubtedly this is the correct view of the matter, and if the distinction here laid down is kept clearly in mind, that unless the duty is recoverable by suit in the same manner as other fines and penalties it is not a penalty within the meaning of the statute giving jurisdiction to the United States district courts, the solution of the question in hand will not be difficult.

The act of March 1, 1823 (3 Stat., 734), contained (sec. 13) the same language as that quoted above from section 11 of the act of 1818, with a proviso referring to "the said penalty of 50 per cent."

The fact is, nevertheless, that the act itself levies a duty and not a penalty, and it is collected as such. It is a duty which burdens like a penalty, and was sometimes referred to as a penalty; but it was not a penalty in any statutory sense, was not collected as a penalty, and in no recent statute is it ever referred to as a penalty.

Section 9 of the act of May 19, 1828 (4 Stat., 274), provides that where the appraised value exceeds the invoice value by 10 per cent, then, in addition to the regular duties—

> *There shall be levied and collected* on the same goods, wares, and merchandise *fifty per centum of the duty so imposed* on the same goods, wares,

and merchandise, when fairly invoiced: *Provided, always*, That nothing in this section contained shall be construed to impose the *last-mentioned duty of fifty per centum*, for a variance between the bona fide invoice of goods produced in the manner specified in the proviso to the eighth section of this act, and the current value of the said merchandise in the country where the same may have been originally manufactured or produced: *And, further*, That the *penalty of fifty per centum* imposed by the thirteenth section of the act entitled "An act supplementary to and to amend an act entitled 'An act to regulate the collection of duties on imports and tonnage, passed the second day of March, one thousand seven hundred and ninety-nine, and for other purposes,' approved March first, one thousand eight hundred and twenty-three" (3 Stat., 734), shall not be deemed to apply or attach to any goods, wares, or merchandise which shall be subject to the *additional duty of fifty per centum*, as aforesaid, imposed by this section of the act.

This is the first instance of an additional duty for undervaluation distinctly levied as an "additional duty." The two former acts, it will be observed, did not strictly levy an additional duty, but merely collected regular duties on an increased valuation. Under this act (the act of 1828) the additional duty is described as a *duty*, but in the second proviso, where reference is made to the act of 1823, the duty is described as a penalty. The reason for this distinction is not clear, but that the distinction was intentional is apparent from the fact

that later in the same proviso where the additional duty of the law of 1828 is referred to it is described as an "*additional duty.*"

In no subsequent act imposing additional duties are the duties referred to as penalties. Thus we have the important fact that *Congress has never imposed these additional duties under any other designation or description than as duties or "further sums," never as a penalty;* and for seventy years has not even referred to them as penalties.

The language of section 17 of the act of August 30, 1842, is substantially the same as that of section 9 of the act of 1828, omitting the provisos.

Attorney-General Legare, referring to that act in an opinion dated June 7, 1843 (4 Op., 182), states: "I am very clear that the 50 per cent in addition to the duty imposed by law on the description of goods mentioned in the last proviso of the seventeenth section of the act of 1842 is a penalty." No reason is given for this conclusion. It is worthy of observation, however, that the very next act of Congress on the subject (act of February 11, 1846, ch. 7, sec. 3, 9 Stat., 3; sec. 2948 R. S.) directly provides "that no portion of [these] additional duties * * * shall be deemed a fine, penalty, or forfeiture for the purpose of being distributed to any officer of the customs."

Section 8 of the act of July 30, 1846 (9 Stat., 43), and section 7 of the act of March 3, 1865 (13 Stat., 494, carried into the Revised Statutes as section 2900), follow the wording of section 17 of the act of 1842.

Then came the act under which this suit is brought,

in which the additional duty is described as a "further sum." (Act of June 10, 1890, 26 Stat., 131, 134.)

> And if the appraised value of any article of imported merchandise shall exceed by more than *ten per centum* the value declared in the entry, *there shall be levied, collected, and paid,* in addition to the duties imposed by law on such merchandise, *a further sum* equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry *more than forty per centum* such entry may be held to be *presumptively fraudulent,* and the *collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws;* and in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut said presumption of fraudulent intent by sufficient evidence.

The following is the most recent legislation on the subject, and is valuable chiefly as showing the continuing intention of Congress on the subject:

July 24, 1897, chapter 11, section 32 (30 Stat., 212):

> And if the appraised value of any article of imported merchandise subject to an ad valorem

duty, or to a duty based on or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, *an additional duty* of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the *additional duties* shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. *Such additional duties shall not be construed to be penal*, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of the exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: *Provided*, That if the appraised value of any merchandise shall exceed the value declared in the entry by *more than fifty per centum*, except when arising from a manifest clerical error, such entry *shall be held to be presumptively fraudulent*, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws.

Does any of the expressions in the acts above referred to convey the slightest hint that these duties are penalties, or that Congress intended them to be considered as penalties? If it had been the intention of Congress to consider and treat these impositions as penal-

ties, is there any good reason why they should not have been named fines and penalties?

There can be but one answer to these questions. Congress did have some object in selecting these expressions. If there is one thing clearer than any other in the study of these statutes, it is the fact that Congress deliberately *did intend*, and it is the *continuing intention* of Congress, that these additional duties should be considered and treated as duties, and this includes the method of their recovery.

II.

Whenever the statutes impose a customs or other penalty, such language is employed as can convey no other meaning.

A few instances are here given by way of illustration:

Section 2809, Revised Statutes—articles found in passengers baggage, etc. The person shall

> be *liable to a penalty* of treble the value.

Section 2809, Revised Statutes—merchandise not on the manifest of the vessel:

> the master *shall be liable to a penalty* equal to the value.

Section 2865, Revised Statutes—passing false invoice through the custom-house:

> every such person, his, her, or their aiders and abettors, *shall be deemed guilty of a misdemeanor and* on conviction *shall be fined* in any sum not exceeding five thousand dollars.

Section 3050, Revised Statutes—false entry for benefit of drawback:

> all such merchandise or the value thereof to be recovered of the owner or person making such entry, *shall be forfeited*, and the person making such false entry *shall also forfeit a sum* equal to the value of the articles mentioned or described in such entry.

Section 3111, Revised Statutes—failure to make entry and pay duties on saloon stores of a vessel. The owner

> *shall be liable to a penalty* of not less than one hundred dollars.

Act of June 10, 1890, section 9 (26 Stat., 135): owner, etc., who shall make or attempt to make entry by means of false invoice, etc., the merchandise or its value to be forfeited and the person—

> *shall, upon conviction be fined* for each offense a sum not exceeding five thousand dollars.

(Same act, section 6):

> Any person who shall knowingly make any false statement in the declarations * * * *shall*, on conviction thereof, *be punished by a fine* not exceeding five thousand dollars.

These instances may be multiplied, and it will be found that whenever a fine or penalty, properly so called and coming within the meaning of section 563, Revised Statutes, is imposed, the language of the statute is uniformly explicit and clear.

III.

The almost uninterrupted practice of the Treasury Department has been to treat these "additional duties" or "further sums" as duties and not as penalties.

Section 369 of the Treasury Regulations of 1857 provides that—

> *Additional duties* incurred as above *can not be distributed among the officers of the customs* and informers, *as fines, penalties, or forfeitures;* but belong wholly to the United States.

See also to same effect section 494, Customs Regulations of 1874. This section is based upon the act of February 11, 1846, chapter 7, section 3 (9 Stat., 3), which is codified in the Revised Statutes as section 2948.

Treasury Regulations of 1857, section 368; 1874, section 494; 1884, article 571; and 1892, article 897, all provide that additional duty for undervaluation is not subject to rebate or drawback upon exportation of the goods. This, seemingly, is opposed to the proposition laid down that the practice of the Treasury Department has been to treat these "additional duties" as duties. The question naturally suggests itself that if these impositions are duties and not penalties, why are they not subject to drawback the same as other customs duties.

In the first place, all other customs duties are not subject to drawback, as in cases of discriminating duties and in all preparations of opium (article 119, Customs Regulations of 1892, citing statutes, etc.).

Drawback is wholly a matter of favor on the part of the United States. The primary reason why it is not allowed in case of additional duties is that if it were allowed it would not only occasion the Government largely increased expenditure in the collection of its customs revenues, but would most effectually frustrate the very object for which additional duties are imposed. For while not penalties they are checks on carelessness and fraud, and properly are not returnable on exportation as in an honest claim for drawback.

"Additional duties" or "further sums," as they are termed in the statute under consideration in this case, are imposed for the purpose of causing the importer to see that his goods are entered at a correct valuation. Undervaluation may arise either through the carelessness of the importer, or through actual fraudulent design on his part. There is, however, no presumption of fraud where an "additional sum" is imposed for undervaluation.

If the importer knows in advance that in case his goods are undervalued he can recover his additional duties as drawback and then enter them again at the appraised value—in other words, that he can be at no possible loss whether the goods are properly valued or not, provided they are not undervalued more than forty per cent, the very incentive and object of the act is lost, and the expense to the Government in collecting the correct duties is doubled.

That this is the correct view of the matter, and that drawback is not refused on the ground that the additional duty is a penalty, is shown conclusively by the

following language employed in the Customs Regulations of 1884, 1892, and 1899, where identically the same language is used in each instance:

> *Additional duty is a personal debt due by the importer to the United States*, which is not in any way impaired by the fact that the goods have left the possession of the importer and have been transported to another port, and *such additional duty is not subject to rebate or drawback* upon exportation of the goods.
>
> (Customs Regulations of 1884, art. 570; 1892, art. 897; 1899, art. 1426.)

As was said by the court in the case of *Bartlett* v. *Kane* (16 How., 274), "a construction which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing."

As early as 1878 it was held by the Treasury Department (T. D., 3774) that the Secretary of the Treasury had no power to remit "additional duties."

> It is settled by the decision of the Supreme Court that the 20 per cent additional duty is not a penalty or forfeiture which the Secretary has power to remit. Although commonly termed a penal duty, neither the word "penal" nor "penalty" is found in the statute; it is merely termed an "additional duty."

And article 570, Customs Regulations of 1884, and article 897, Regulations of 1892, provide that—

> The Secretary of the Treasury has no power to remit additional duty when it accrues.

The opinion of Attorney-General Olney in 1893 (20 Op., 660) decided that these additional duties were penalties, and as such might be remitted by the Secretary of the Treasury. Thus the uninterrupted practice of the Department charged with the administration of this law was altered, and thereafter the Secretary of the Treasury remitted additional duties, as in case of other penalties incurred under the customs laws.

But this construction of the law was not long allowed to prevail, for in 1897 (act of July 24, 1897, sec. 32, 30 Stat., 212) Congress declared that such "*additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided* except in case of manifest clerical error, *nor shall they be refunded* in case of exportation of the merchandise, or on any other account, *nor shall they be subject to the benefit of drawback.*"

Here, then, is a recognition by Congress of the fact that these duties were formerly construed to be penal, and a distinct statement of the will of Congress—the continuing will of Congress, for this is the latest legislative expression on the subject—that these duties shall not hereafter be construed to be penal, and that they shall not be subject to the consequences which would result if they were penalties.

Thereupon the Treasury Department immediately reverted to its former practice, and in the next issue of the Customs Regulations, in 1899, article 1426, repeated the exact language of former regulations on the subject.

Thus the changed language of the act of 1897 seems to mean, not that the intention of Congress had changed, but that it was affirming in more positive terms an intention which had always been manifest—the affirmation being called forth simply because of Mr. Olney's reversal of previous views and practice.

IV.

There is no recorded decision which holds that additional duties for undervaluation are penalties. There are two instances in which the courts were obliged to pass upon this very question, and wherein these duties were held to be duties and not penalties.

A brief review is given of all decisions which are thought to bear in any material respect upon the question at issue.

It will be seen that additional duty is referred to under many different descriptions, as a "penalty," "penal duty," "the penalty of an additional duty," "additional duty," "increased duty," "extra duty," and as a "*duty*" (*Grinnell* v. *Lawrence*, 1 Blatchf., 348, 350). Not infrequently, even in the same paragraph, it is referred to both as an additional duty and as a penalty, showing that these expressions are not intended to indicate or pass upon the character of the exaction, whether as a duty or as a penalty. It is therefore quite evident that these various expressions can have but slight bearing on the determination of the question under consideration. In several instances the term penalty or penal duty seems to have been chosen as a convenient method of distinguishing between the increase of the regular duty consequent

upon the advancement of the invoice price to the appraised value, and the additional duty assessed for undervaluation.

Thus *Bannendahl* v. *Redfield* (4 Blatch., 223) and *Bischoff* v. *Maxwell* (Id., 384) speak of the duties as a penalty; *Crowley* v. *Maxwell* (3 Blatch., 383) and *Schneider* v. *Barney* (6 Fed. Rep., 150) use both terms, "additional or penal duties" and "additional duty" or "penalty;" some such cases employ variant expressions for the duty idea, as "increased duty," "extra duty" (*Manhattan Gaslight Co.* v. *Maxwell*, 2 Blatch., 405, 409; *Morris* v. *Maxwell*, 3 Blatch., 143). One case speaks of the "penalty of an increased duty" (*Pings* v. *United States*, 72 Fed. Rep., 260).

The point here made is, that while there has never been a single case squarely deciding that these additional duties or further sums are penalties, there are at least two decisions holding that *they are not penalties, but duties.*

In *Bartlett* v. *Kane* (16 How., 263) there is the nearest approach to a decision that additional duties are penalties. It was an action wherein, among other points not material to the case in hand, the importer sought to recover back the "additional duties" as a drawback, upon reexportation of the goods. The court said:

> An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts

> by importers to escape the legal rates of duty. In several of the acts this *additional duty* has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be *regarded in the light of a penal duty* (p. 274).

It will be noticed that the decision is not that the additional duty *is* a penalty, but only that it is to be regarded *in the light of* a penal duty, and that in connection with the subject of drawback.

No act has been discovered wherein additional duty has been distributed to officers of the customs upon the same conditions as penalties and forfeitures. Undoubtedly it was the early practice to distribute additional duties for undervaluation in that manner, but it was presumably under the general provisions of section 69 of the act of August 4, 1790 (1 Stat., 177), and of section 91 of the act of March 2, 1799 (1 Stat., 697), providing—

> "That *all* fines, penalties, and forfeitures recovered by virtue of this act," shall be distributed, etc.

In *Ring* v. *Maxwell* (17 How, 147), the court refused to pass upon the question whether the "additional duties" levied under section 8 of the tariff act of July 30, 1846, were or were not penalties, stating that it was unnecessary,

> because we are all of the opinion that whatever may be the nature of the sum levied as addi-

> tional duties * * * they are not distributable as penalties.

In *Stairs* v. *Peaslee* (18 How., 521, 530), which is cited in the brief for the plaintiff in error (p. 32) with erroneous statements and inferences, the court simply held that—

> after that construction [granting to an importer the privilege of making additions to invoice value] has been thus sanctioned, impliedly, in judicial proceedings in this court, *and acted on for so many years* (1846–1853) by all the parties interested, the court thinks it ought to be regarded as settled, and that what has been done under it ought not to be disturbed.

In *Swanston* v. *Morton* (1 Curt., 294) the court said:

> It is true the tariff act denominates it additional duty, but it clearly appears, from the circumstances under which it was to be levied, that *it was an additional duty, by way of penalty*, for not declaring the true value. And if it were necessary to decide upon the strictly technical term appropriate to such a demand, I am by no means clear that it would not be the word penalty. But it is not necessary to go to this length (p. 296).

The court in *Passavant* v. *United States* (148 U. S., 214, 221) declined to decide the point, viz:

> It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character (p. 221).

From *Howland* v. *Maxwell* (3 Blatchf., 14[illegible]: and see

also *Carnes* v. *Maxwell*, id., 420)—permitting an importer to amend his entry and avoid additional duty, because there was no fraudulent undervaluation and the corrected invoice was produced before appraisal—it is very evident that if the additional duty were a penalty, or in its nature punitive, no subsequent act of the importer could have been allowed by the court to avoid the penal consequences of his act.

United States v. *Collier* (3 Blatchf., 325, 348) is one of the two cases where the question whether additional duties are duties or penalties was directly before the court, and where it was decided that they are duties.

The action was to recover balance due the United States from defendant on his official bond as collector. Among various credits claimed by defendant was one for $14,000, being a moiety of a sum collected by him for "additional duties" of 20 per cent ad valorem for undervaluation, to which he would have been entitled had the "additional duties" been a penalty. This claim had already been disallowed by the Treasury Department. The court said:

> We consider the case of *Ring* v. *Maxwell* (17 How., 147) as determining that the sum so demanded by the defendant *did not accrue from fines or penalties, but was composed of duties chargeable by law on merchandise imported.* Accordingly, defendant has no legal claim to that sum.

"*This case was taken to the Supreme Court by writ of error, and the judgment of the circuit court was affirmed* by a divided court. For that reason the case does not

appear in the reports of the Supreme Court." (See note to this case, 3 Blatch., 325.)

Maillard v. *Lawrence* (3 Blatch., 378, 381) is the second case directly in point where it was necessary for the court to decide this very question.

The action was for the recovery of an alleged excess of duties, including an additional duty of 50 per cent arising under section 17 of the act of August 30, 1842 (5 Stat., 564). Objection was made on the part of the Government as to the form of the protest regarding the 50 per cent additional duty. The importer's contention against this was that additional duty was a penalty and that accordingly the provision of law as to protest did not apply. As to this defense the court said:

> *We do not accede to the proposition* of the plaintiffs that the 50 per cent added to the regular duties may be recovered by them without protest on the ground that it is a penalty. *We regard it as an increase*, in the contingency specified, *of the duties chargeable on the importer*, and, accordingly, are of opinion that *the importer must pursue the same course, in respect to that incident, as to the principal*, and can not recover it as a separate demand and cause for action, but only upon protest, as required by the act of 1845.

And so with regard to the case in hand, the "further sum" imposed *should be regarded as an increase of duties chargeable on the importer, and accordingly the United States should pursue*, and did pursue, the same course

as regards the procedure incident to *its recovery as for the recovery of regular duties.*

This same question as regards protest also arose in the case of *Falleck* v. *Barney* (5 Blatchf., 38, 1862), which was an action to recover back additional duty claimed to have been illegally exacted. The goods having been libeled and acquitted in a previous action, it was claimed that the collector had exhausted his authority and could not afterwards collect the "additional duty," but this objection was not stated in the protest. The court said:

> But if this were a valid objection to the exaction of *additional duty*, it should have been stated in the protest. It has been repeatedly decided that no objection can be made in an action of the present character to the validity of the duties demanded, which is not distinctly and specifically set forth in the protest. * * * *The statute which requires the grounds of objection to the payment to be set forth in the protest applies to this additional 20 per cent as well as to the ordinary rate of duty.* This is well settled (p. 39).

Protest, then, is a prerequisite to the recovery of additional duty, but is not required in case of a penalty.

Belcher v. *Lawrason* (21 How., 251, 256, 257) speaks of the "increased duty in case of undervaluation;" and *Kriesler* v. *Morton* (2 Curt., 239) says that additional duties paid under section 8 of the act of 1846 were held to be "*paid as and for duties*," and protest a prerequisite to the recovery of such duties.

In *United States* v. *25 Cases Cloth* (Crabbe, 356, 385, 386) the question was whether the additional duty

provision of the act of 1818 (*ante*) was a repeal of the provision of section 66 of the act of March 3, 1799, imposing forfeiture by reason of a false invoice Here Judge Hopkinson held to the contrary, and in his charge to the jury said:

> *The statutes do not relate to the same matter;* they describe and provide for dissimilar cases; *the first for a false invoice with a design to evade duties*—that is, *with a fraudulent intention—the other for an undervaluation of the goods without any such design.* It is obviously just and reasonable that the penalty in the former case should be an entire forfeiture of the goods, but that the error in the latter should be repaired by imposing an *additional duty* on them. *This act, then, of 1818, and all the provisions in it for appraisement, have for their object the ascertainment of duties,* while the law of 1799 inflicts forfeiture for a designed fraud.

This is the essential fact which we are endeavoring to show, viz, that the statutes in regard to the recovery of additional duties for innocent undervaluation and those which refer to fraudulent undervaluation "*do not relate to the same matters; they describe and provide for dissimilar cases.*" And inasmuch as they provide for dissimilar cases, they are recovered in a dissimilar manner. One is treated as a duty and is collected as such; the other is treated as a penalty and is enforceable as such in the district court.

In *United States* v. *Sixty-seven Packages of Dry Goods* (17 How., 87) this court also pointed out the distinction between additional duties imposed in case of

undervaluation where there is no question of fraudulent intent and forfeiture where there is an intent to evade duty.

> *This additional duty is imposed* in case the appraised value exceeds the invoice price of the goods 10 per centum, *irrespective of the question of fraudulent intent.* Undoubtedly if this additional duty has been levied upon the goods by the Government, it can not forfeit them under the 66th section: *but, if the collector is satisfied that the undervaluation in the invoice has been made with intent to evade the duties, instead of levying the additional duty a forfeiture may be declared.* * * * We are satisfied that there is no provision in the act of 1842, or in any of the duty acts, operating as a repeal of the 66th section of the act of 1799.

In the later cases arising under the amendments of 1897 to the customs administrative act (e. g., *United States* v. *Gray*, 107 Fed. Rep., 104) it is held that additional duties must be treated in precisely the same way as regular duties.

Aside from the special provision of the act of 1897 that additional duties shall not be construed to be penal, the distinctions made in this act between undervaluation not presumed to be fraudulent and fraudulent undervaluation involving forfeiture are precisely the same as in the act of 1890, the only difference being in the amount of the additional duty imposed.

V.

Distinctly different lines of procedure and incidents are involved where "additional duties" or "further sums" are imposed, and where penalties and forfeitures are incurred under the customs laws.

One of the best methods of determining whether these "further sums" were intended by Congress to be considered as penalties or duties is a consideration of the setting of incidents with which they are surrounded and the method outlined for their recovery. If the incidents are those of a duty, and the method of collection similar to that for the collection of a duty, and particularly if this is placed in contrast with the action required of the collector in recovering penalties and forfeitures for violations of the customs laws, then it may reasonably be inferred that Congress intended that the direct connection between the regular duties and the "further sums" in the matter of collection shall also continue to the next stage in the effort for recovery in case it becomes necessary to institute suit.

Section 7 of the customs revenue act of June 10, 1890 (26 Stat., 134), under which this action is brought, provides that—

> If the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, *there shall be levied, collected, and paid*, in addition to the duties imposed by law on such merchandise, *a further sum*, etc.

The collection of this sum is performed by the collector, and its amount is ascertained by liquidation,

the same as regular duties. As contrasted with this, where the undervaluation has reached the point where it is presumptively fraudulent and forfeiture accrues, it is provided that—

> If such appraised value shall exceed the value declared in the entry more than forty per centum, such entry may be held to be presumptively fraudulent, and *the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws;* and in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud.

The collector of customs may seize such merchandise *and proceed as in case of forfeiture* for violations of the customs laws. Section 3084, Revised Statutes, provides that all cases where fines, penalties, or forfeitures have been incurred under any law of the United States, the collectors of customs shall report the matter to the district attorney within ten days for the institution of forfeiture proceedings. Here, then, is a marked distinction. "Additional duties" are liquidated and collected by collectors of customs the same as ordinary duties; but when penalties and forfeitures are incurred under the customs laws, the matter is not dealt with by him at all, but is reported to the district attorney, the goods leave the possession of the collector and are taken into custody by the United States marshal, and legal proceedings are instituted in the district court.

If additional duties are penalties, then it has been

the duty of collectors all along to report these matters to the district attorneys. Section 3084, Revised Statutes, provides that "The several collectors of customs *shall report* within ten days," etc., and if any collector shall fail to report such cases, then "*such collector's right to any compensation, benefit, or allowance in such case shall be forfeited to the United States.*" Evidently these additional duties have not been understood by the collectors to be penalties within any such meaning as is contended by the plaintiff in error, or these matters would regularly have been reported to the district attorneys.

If additional duties are penalties, then collectors of customs have been collecting penalties instead of duties, and importers have not had the benefit of a legal proceeding to ascertain whether penalties have been actually incurred. It is the duty of collectors to collect duties and not penalties, and the statutes could hardly give them authority to collect penalties within the meaning of section 563, Revised Statutes, giving the district court jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States.

In the first branch of undervaluation burdens the presumption is of innocence; in the second the presumption is of guilt.

In the first instance, the additional duties "shall *only apply* to the particular article or articles in each invoice which are undervalued," a further evidence that there is no presumption of wrongdoing; in the second, the forfeiture involves the whole entry. It is

provided in this section that "the forfeitures provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued."

The words "There shall be *levied, collected, and paid a further* sum," immediately afterwards described as "*the additional duties*," convey the idea of civil liability as for debt; and the customs regulations repeatedly state that "*additional duty is a personal debt due by the importer to the United States*" (Customs Regulations of 1884, art. 570; 1892, art. 897; 1899, art. 1426); whereas the words "*presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeitures for violations of the customs laws*," can convey no other meaning than that of a penalty. The above is the view of the Treasury Department, and if additional duty is a personal debt due the United States, which it really is, then it certainly can not be a penalty within the meaning contended.

Collectors of customs are not entitled to a moiety of additional duties.

Protest is required as an essential prerequisite in an action for the recovery of additional duties.

The Secretary of the Treasury can not remit additional duties. The statutes have never authorized such remission, and, as before shown, it has been the almost uninterrupted practice of that Department not to remit these duties. The Secretary of the Treasury is, however, authorized to remit fines and forfeitures incurred under the customs laws.

And again: Suppose Helwig had refused to pay the additional *regular* duties accruing because of the increased valuation, how would this suit have been brought? In the circuit court or in the district court? or would there have been two actions—one for the regular duties in the circuit court, and another for the "additional sum" in the district court? There must have been two actions if this further sum is a penalty, for the regular duty could never have been joined in an action for the recovery of a penalty. But is there anything incompatible with the joining of the regular duties and the further sum in a civil action for the recovery of duties? And if such an action were instituted, could it be brought anywhere but in the circuit court? If this feature had been involved in the case, the action would never have been brought to the attention of this court for determination. It is only when the "further sum" is torn from its natural surroundings and incidents that there can be any doubt on this subject.

Congress has all along treated these additional duties in the same connection and in the same manner as regular duties; it has surrounded them with the same incidents, making protest a prerequisite to their recovery, and making them collectible by the collector of customs, like regular duties. There can be no doubt that when it becomes necessary to recover them by suit, Congress intended that they should be recovered in the same manner as regular duties.

VI.

The "further sum" is not punitive in its nature, nor is it imposed because of an offense, strictly speaking; it is designed to secure a more careful valuation of imported merchandise.

The law relating to the collection of additional duties has been a matter of continual growth and development. Primarily the object was to protect the Government from the undervaluation of goods, and it is probable that originally the question whether the undervaluation was the result of innocent or fraudulent intent entered slightly into the consideration of the legislators who framed these laws. It is worthy of note, however, that additional duties have always been imposed and collected in the same manner, viz, as duties and not as penalties. The act of 1890 was at that time the culmination of experience along this line, and is the statute upon which this action is based.

This statute recognizes two facts which should always be taken into consideration in the case of an importation. First, that the valuation of imported merchandise is a matter largely of opinion, and can seldom, if ever, be determined with absolute accuracy. An importer may value his goods correctly, according to his best judgment, and yet if all the appraisers throughout the United States were to pass upon their value, it is reasonably certain that there would be a difference of opinion, some agreeing with the importer as to their value, and others placing a higher valuation. The importer, therefore, is confronted with the fact that if he enters his goods at a port

where the appraisers happen to think as he does, then his goods would be held to be correctly valued; but in case he enters them at some other port where the appraisers are of different opinion, then he would be obliged to pay an additional duty. Secondly, that an undervaluation may be either innocent or intentional, and that, while it is manifestly unjust to punish with a penalty a person who has been guilty of no intentional wrongdoing, it is nevertheless perfectly proper and even necessary that some sort of restriction be placed upon the careless valuation of imported merchandise. Undoubtedly such restrictions operate equally upon the guilty importer as upon the innocent, and have the same deterrent effect upon both; but the statute up to the 40 per cent mark considers the undervaluation innocent and unintentional, and for that reason imposes not a penalty which would have to be recovered in the district court but an additional duty collectible by the collector of customs as an ordinary duty. When undervaluation reaches 40 per cent, the presumption of guilt becomes strong, and for undervaluation of more than 40 per cent the statute deems it presumptively fraudulent and authorizes the seizure and forfeiture of the goods.

Section 7 of the tariff act of 1890 is not, therefore, a nicely graded system of penalties for undervaluation of imported merchandise, and the additional duty is not laid because of a criminal offense, but under the presumption of innocence, and therefore the imposition can not be punitive, for there can properly be no pun-

ishment unless there has first been an offense committed. It is only after the 40 per cent mark is reached that punishment is inflicted. Then the presumption is that of fraudulent undervaluation, which *is* an offense against the customs laws, and the goods are seized and proceeded against, to use the language of the statute, *as for violation of the customs laws*, implying very plainly that the other provisions were not directed against a technical "violation of law."

VII.

The "further sum" is not a penalty within the meaning of section 563, Revised Statutes, giving jurisdiction to the district court.

The circuit court had original jurisdiction in this case.

It is not denied that additional duties and further sums levied for undervaluation of imported merchandise may not, in the broadest acceptation of the term, be described as penalties, but it is denied that these duties or exactions are penalties in a legal sense, as coming within the meaning of section 563, Revised Statutes, which provides that the district court shall have jurisdiction of "all suits for penalties and forfeitures incurred under the law of the United States."

The question may be asked, Can Congress declare an act or exaction of one nature to be something else than it really is? In other words, Has Congress the power to change the quality of an act by merely giving it another name?

Congress, it is true, can not change the quality of an act, but it may determine whether a certain act

constitutes a crime or other offense against the laws of the United States.

As was said by this court in the case of *Passavant* v. *United States* (148 U. S., 214):

> It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character (p. 221).

And what Congress had the power to do, it did do. If there is one thing clearer than any other in the study of this subject, it is that Congress deliberately did intend that these additional duties should be treated as duties and not as penalties. Witness the various expressions of Congress in enacting these laws. Everywhere in the list of these expressions we see repeated the word, "duties," but never once the word "penalty." If these additional duties are penalties, why is it that Congress persistently terms them additional duties, or words of a similar import, conveying the idea of debt for civil liability? If these duties are penalties, why has Congress surrounded them with the incidents of a duty and made it the duty of the collector of customs to collect them the same as other duties? Why not have named them penalties and made them recoverable as such?

Now, there are two kinds of penalties. Penalties which arise from a violation of the criminal laws, punishable by fine, forfeiture, imprisonment, etc., and those arising from a civil offense which are usually in the nature of fines. In common parlance they, too,

are termed penalties; but they are not penalties in the sense that there is anything penal or criminal about the act which they seek to restrain or correct.

For instance, the levying of 1 per cent a month for nonpayment of taxes is a penalty in ordinary acceptation and usage; but it is not a penalty in any sense which would authorize suit therefor to be brought in a court designed for the enforcement of criminal laws. The penalty in such case is that of a debt and it is collectible as such.

The district court deals primarily with crimes and similar offenses, penalties, and forfeitures; and the circuit court with all suits of a civil nature at common law or in equity, including all suits for the collection of import duties. Section 629, Revised Statutes, provides that the circuit courts shall have jurisdiction—

> Fourth. Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, * * * except suits for penalties and forfeitures.

It is respectfully submitted that for the above reasons and the reasons heretofore given in this brief, this action was properly brought in the circuit court.

It is a suit at common law, an action of debt wherein the United States is plaintiff. It is also a suit at law arising under an act providing for revenue from imports. Section 629, Revised Statutes, provides that the circuit court shall have original jurisdiction—

> Third. Of all suits at common law where the United States, or any officer thereof suing

under the authority of any act of Congress, are plaintiffs.

The fact that additional duties are an exaction and charge resting upon an importer, which may sometimes be highly onerous, and the "penal" implications used in ordinary language and in judicial decisions to describe this burdensome thing, can not change a customs *duty* into a *penalty* as for a crime or offense. We respectfully submit that the question certified should be answered in the affirmative.

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No. 63.

Supplemental Brief for Defendant (Appellee).

Term No. 19, 1904.

In the Supreme Court of the United States.

October Term, 1904.

Russell Harding, Receiver, &c., Appellant,

vs.

The United States, Appellee.

On motion to dismiss appeal and affirm decree of Court of Appeals for the Fifth Circuit.

Supplemental brief for the appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

RUDOLF HELWIG, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 65.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Bartlett v. *Kane* (16 How., 263) was decided in 1853 and related to transactions subsequent to the enactment of the tariff act of 1846 and the other act of that year (Feb. 11, 9 Stat., 3; now sec. 2948, R. S.), which forbade the distribution of additional duties as penalties to officers of the customs. The latter act was not mentioned in the opinion. The court says that in several acts additional duty has been distributed among customs officers as penalties. This is not strictly accurate, since it implies that such distribution had been recognized or authorized by statute, which is not the fact—a practice, merely, without express authority, having grown up. The court's statement, not referring to the act of February 11, 1846, seems to have been

made as a preliminary reason for assimilating additional duties to penalties as between the United States and the importer, in reference to drawback. But the court could have found little persuasiveness in this view if the act of February 11, 1846, had been in its mind.

The opinion shows clearly the real reason why additional duties, although not penalties, should not be recovered as drawback on reexportation. Regularity and carefulness as well as honesty and the absence of fraud should characterize the relations between importers and Government; and the effect of additional duties as checks would not be secured if importers could avoid the onerous results of their indifference or dishonesty by reexporting and claiming drawback.

The opinion says that return of "forfeitures or amercements" is not in the purview of the system of regulations providing for drawback. These two words aptly include the idea of a penalty where there is fraud, and of an extra duty exaction only where the undervaluation is not fraudulent.

As to the circuit court act of 1887, suggested in questions from the Bench, it was corrected, respecting certain formal errors, by the act of August 13, 1888 (sec. 1, 25 Stat., 433), and does not substantially differ from the act of 1875 (18 Stat., 470), or, indeed, from the original judiciary act of 1789 (sec. 11, 1 Stat., 78), so far as the present question is concerned. The variations in the development of this law affect jurisdictional amount, character of the parties, and removal

of causes from State courts, and not the point whether circuit courts have jurisdiction of penalties. The gist of the provisions applicable here is that circuit courts shall have original concurrent cognizance with State courts of civil suits involving the necessary amount arising under the Federal Constitution and laws, or in which the United States are plaintiffs; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States except as otherwise provided by law, and concurrent jurisdiction of crimes and offenses cognizable by the district courts.

United States v. *Mooney* (116 U. S., 104) construed the act of 1875 and positively decided that exclusive jurisdiction over suits for the recovery of penalties and forfeitures remained with the district courts notwithstanding the act of 1875. This decision was substantially affirmed in *Lees* v. *United States* (150 U. S., 476), although that case particularly related to a penalty imposed for an offense clearly penal (it would seem) under the immigration act of 1885.

Nor is it likely that the jurisdiction of the circuit courts may be thus enlarged on the view that they are given concurrent jurisdiction over *crimes and offenses* cognizable in the district courts. For while in one aspect an action to recover a penalty is criminal in its nature (as observed by the court in *Lees* v. *United States*), perhaps because of the nature of the act respecting which it is imposed, on a strict view of jurisdiction it seems clear that such suits are considered as civil

even when enforcing forfeiture. (*Ketland* v. *The Cassius*, 2 Dall., 365; *United States* v. *La Vengeance*, 3 Dall., 297; *The Sarah*, 8 Wheat., 391.) It does not seem possible, therefore, to bring such a suit under the jurisdiction of the circuit court as included in its concurrent competence to hear and determine crimes and offenses. A penalty may relate to an offense, but is not one, substantively, under the most liberal view. Speaking of a forfeiture, Justice Wilson says, in *Ketland* v. *The Cassius*, *ut supra:* "To take cognizance of a proceeding merely *in rem* can not be considered as taking cognizance of a crime or offense."

Many of the cases which regard suits for forfeitures or penalties as civil suits rest, it is true, upon the civil jurisdiction in admiralty; but this does not seem to be the only ground for the distinction. In the case of *Ketland* v. *The Cassius* the argument in favor of the circuit court's jurisdiction was that the case was not a civil case of maritime jurisdiction, but a proceeding to enforce a forfeiture for an offense, not included among seizures under laws of impost, navigation, or trade; and that an information to enforce a forfeiture fell under the circuit court's jurisdiction by section 11 of the act of 1789, giving "exclusive cognizance of all crimes and offenses." Mr. Rawle, then United States attorney, argued that such proceedings are civil suits, citing *Cowper*, 391, and *United States* v. *Le Vengeur* (unreported). At all events, it is in general unusual to proceed to recover penalties and forfeitures by indictment or information in a criminal action. Finally, the clear

implication of the fourth subdivision of section 629, Revised Statutes, is that a suit for a penalty and forfeiture is a suit at law or a civil cause.

As the same concurrent jurisdiction was conferred by the original judiciary act, the remark of the court in *Mooney* v. *United States* should doubtless be borne in mind, viz: "But it was never supposed that under the act of 1789 the provisions of section 11 interfered with the exclusive jurisdiction conferred on the district courts by section 9 of the same act."

Therefore for the following reasons it seems necessary to concede that if the additional duties here *are*, in fact, a penalty, the jurisdiction is in the district court:

1. Because that court is expressly given jurisdiction by section 563, which was originally held to be exclusive and still seems to be so regarded. (See the opinions in the Mooney and Lees cases.)

2. Because by the fourth subdivision of section 629 the grant of jurisdiction to the circuit court expressly excepts suits for penalties and forfeitures.

3. Because a suit for a penalty under the customs laws is not one of those expressly assigned to the circuit court as by subdivisions 5, 7, 15 of section 629.

4. Because the later jurisdictional acts, as construed by the case of *Mooney* v. *United States*, approved in *Lees* v. *United States*, do not seem to have changed the previous law on the point.

The court perceives that on this branch of the case, suggested from the Bench, the Government counsel

considers it his duty to submit the state of the law on the subject for the information of the court, rather than to insist, merely as an advocate, that in any event the jurisdiction sought by the United States is competent.

HENRY M. HOYT,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 65.—October Term, 1902.

Rudolph Helwig, Plaintiff in Error, vs. The United States. } On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[February 23, 1903.]

This case comes before the court upon a certificate from the United States Circuit Court of Appeals for the Second Circuit. The certificate contains the following statement:

"In February and March, 1895, Rudolph Helwig, plaintiff in error, made three certain importations of wood pulp into the United States, entering the same at the custom house at the port of New York. As the facts are substantially the same in respect to each importation, except as to values, amounts, date, &c., they are spoken of herein as one importation.

"At the time when said wood pulp was imported the duty imposed by law on wood pulp was ten (10) per centum ad valorem, (paragraph 303, act of August 28, 1894.)

"Upon making the entries at the custom house, Helwig declared the invoice and market value to be marks 191 per ton; the aggregate invoice value of all three importations was $13,252.00 in United States currency; at the time of making the entries Helwig paid to the collector of customs $1,325.20, being the duty upon said wood pulp at the rate of ten (10) per centum ad valorem based upon the invoice value.

"The merchandise was thereafter appraised by the United States appraiser, as provided in section 7 of the act of June 10, 1890, (26 Stat. at Large, 131,) who reported that the foreign market value of said wood pulp was marks 263.70 per ton; Helwig thereupon requested a reappraisement by a United States general appraiser, in accordance with section 13 of the act of June 10, 1890; a reappraisement was had, and the United States general appraiser reappraised the market value of said wood pulp at marks 245 per ton net; thereupon Helwig appealed to the board of United States general appraisers, in accordance with said section 13 of the act of June 10, 1890, and said board affirmed the decision of the United States general appraiser, thereby deciding that the foreign market value of said wood pulp was marks 245 per ton net, and making an advance over the invoice and entered value of over twenty-seven per centum.

"Thereupon the collector of customs liquidated said entries, fixing the dutiable value of all of said merchandise at $16,792.20, and computing the duty thereon at the rate of ten per centum at $1,679.20, and made demand upon said Helwig for the sum of $354, being the difference between the amount already paid by Helwig and the amount of duty at the rate of ten (10) per centum ad valorem found to be due on said final reappraisement; thereafter Helwig paid the sum of $354, and that amount is not in question on this appeal.

"At the time the collector of customs found said additional sum of $354 to be due, as aforesaid, he also found and decided that there was due from Helwig to the United States the further sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), and made demand for said amount, said amount being the further sum in addition to the duties imposed by law, ascertained and fixed as provided in section 7 of the said act of June 10, 1890, being 2 per centum of the total appraised value of said merchandise for each 1 per centum that such appraised value exceeded the value declared in the entry.

"Before the commencement of this action Helwig duly presented his petition to the United States District Court for the Southern District of New York, claiming that said sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68) was a penalty, and praying that the district judge would cause an investigation of the facts to be made, in accordance with section 5292 of the Revised Statutes and sections 17 and 18 of the act of June 22, 1874, (18 Stat. at Large, 186,) and cause the facts to be stated and transmitted to the Secretary of the Treasury, and praying that said penalty be remitted on the ground that it had been incurred without willful negligence or intent to defraud.

"The said district judge caused such summary investigation to be made, and a statement of the facts shown thereon was duly transmitted to the Secretary of the Treasury, who, thereafter, and on the 6th day of July, 1898, found and decided that said penalties had been incurred without willful negligence or intention of fraud on the part of said Helwig, and thereupon mitigated the penalties to one-half of the amount thereof, namely, $4,533.84.

"Subsequently the collector of customs relinquished said entries, reducing the amount of said further sum to $4,533.84, and again made demand upon Helwig for payment. As Helwig did not pay the amount suit was commenced against him in the Circuit Court for the Southern District of New York on the 24th of August, 1898. Upon learning of the pendency of that suit, however, the Secretary of the Treasury advised the collector that he revoked his decision of the 6th of July, 1898, and directed the collector to reliquidate the entries at the original amount and to request the United States attorney to institute suit for nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68).

"The collector followed these instructions and again reliquidated the entries accordingly.

"The suit then pending was discontinued and the present action begun, including the full amount of the penalty, namely, nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68).

"The case was tried at the Circuit Court upon an agreed statement of facts.

"Upon the reading of the agreed statement of facts, the plaintiff in error moved to dismiss the complaint and for the direction of judgment in his favor, on the ground that the action was to recover a penalty or penalties arising under the customs laws, and that under the provisions of sections 629 and 563 of the Revised Statutes the United States Circuit Court had no jurisdiction in such an action. The motion was denied and plaintiff in error duly excepted.

"The court subsequently directed judgment in favor of the United States for the amount of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), together with interest and costs.

"The defendant thereafter sued out his writ of error to this court.

"The sum for which judgment was rendered, namely, nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), being the 'further sum' accruing 'in addition to the duties imposed by law,' upon wood pulp, under the provisions of section seven of the act of June 10, 1890."

Upon these facts the court has asked the following question:

"Has the United States Circuit Court jurisdiction of an action to recover the aforesaid 'further sum' accruing 'in addition to the duties imposed by law,' under the provisions of section seven of the act of June 10, 1890 (26 Statutes at Large, 131)?"

Mr. Justice PECKHAM, after making the foregoing statement of facts delivered the opinion of the Court.

That part of section 7 of the customs administrative act of 1890, (26 Stat. 131, 134,) which relates to the question involved in this case is set forth in the margin.*

By section 629, Revised Statutes, subdivisions third and fourth, jurisdiction is granted to the Circuit Court of all suits at common law where the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs, and of all suits at law or equity, arising under any act providing for revenue from imports or tonnage, except suits for penalties and forfeitures.

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*SEC. 7. . . . And the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry more than forty per centum, such entry may be held to be presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws; and in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut said presumption of fraudulent intent by sufficient evidence: *Provided*, That the forfeitures provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: *And provided further*, That all additional duties, penalties or forfeitures, applicable to merchandise entered by a duly certified invoice, shall be alike applicable to goods entered by a *pro forma* invoice or statement in form of an invoice. The duty shall not, however, be assessed upon an amount less than the invoice or entered value.

Under this section the plaintiffs claim the Circuit Court had jurisdiction in this action as one at common law, &c., or as one arising under any act providing for revenue, and not being one for a penalty or forfeiture.

By section 563, Revised Statutes, jurisdiction is conferred upon the District Court in various cases, the third subdivision of which section gives it jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States.

It has been heretofore held that the act conferred exclusive jurisdiction upon the District Court in suits for penalties or forfeitures. The early cases to that effect are cited in *United States* v. *Mooney*, (116 U. S. 104;) *Lees* v. *United States*, (150 Id. 476, 478,) and the above two cases reiterate the same holding. It would seem to be beyond the necessity of further argument since the decision of these cases that the jurisdiction is exclusive in the District Court of all actions to recover for a penalty or forfeiture. Indeed, the counsel for the government frankly concedes that if this action be one to recover a penalty or forfeiture exclusive jurisdiction is by the law vested in the District Court.

The sole question is whether the sum imposed by section 7, already quoted, is a penalty?

Without other reference than to the language of the statute itself, we should conclude that the sum imposed therein was a penalty. It is not imposed upon the importation of all goods, but only upon the importer in certain cases which are stated in the statute, and it is clear that the sum is not imposed for any purpose of revenue, but is in addition to the duties imposed upon the particular article imported, and in each individual case when the sum is imposed it is based upon the particular act of the importer. That particular act is his undervaluation of the goods imported, and it is without doubt a punishment upon the importer on account of it. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character. If it be said that the provision operates as a warning to importers to be careful and to be honest, it is a warning which is efficacious only by reason of the resulting imposition of the "further sum," in addition to the duties, provided for by the statute.

This case is a good illustration of the penal features of the statute. The aggregate value of the merchandise as entered by the importer was $13,252, and the amount of duty provided for by the statute (ten per centum) was $1,325.20. The final reappraisement made under section 13 of the same act was $16,792.20, and the duties $1,679.20, the difference being $354; yet this difference in valuation between the importer and the appraisers, though the valuation of the importer was made without intent to defraud, brought upon him the imposition, under the statute, section 7, of the additional sum of $9,067.68, being the "further sum" spoken of in

the statute in addition to the payment of the $354 of duty, which was demanded of the importer by reason of this difference. Now what can this be but a punishment, or, in other words, a penalty for undervaluation, whether innocently done or not? It certainly was no reward of merit, and whether called a "further sum" or an "additional duty," or by some other name, the amount imposed was so large in proportion to the value of the merchandise imported, as to show beyond doubt that it was a sum imposed not, in fact, as a duty upon an imported article, but as a penalty and nothing else.

The statute also provides that, if the appraised value exceed by more than forty per centum the value declared in the entry, then the entry value is presumed fraudulent and the whole property is to be seized by the collector, who is to proceed as in the case of a forfeiture, and the burden of showing that the undervaluation was not fraudulent is cast upon the importer. Now, whether the excess in valuation on the reappraisement is more or less than forty per centum of the value declared in the entry, seems to be important only upon the question of the presumption of fraud and the consequent forfeiture of the whole property. If more than forty per centum, the presumption of fraud is declared by the statute and the property is forfeited, unless the importer shows there was no fraud. If less, the sum imposed by the statute is to be paid, but the property is not forfeited. In the case of good faith, it is simply a less penalty than in the case of fraud. It is, however, argued that the error for undervaluation not fraudulent is repaired by imposing an additional duty on the particular goods in such invoice which have been undervalued, and there is no penalty, a simple enlarged duty upon merchandise, while in the other case the presumed fraudulent undervaluation, (if the fraud be found,) the whole of the merchandise is forfeited by the expressed terms of the statute

Whether the error is repaired by imposing the sum named as an additional duty, is not material in the consideration of the nature of the imposition. It is still a punishment and nothing else, because of the carelessness, ignorance or mistake, without fraudulent intent, upon the part of the importer. If the fraudulent intent were present, the penalty would be enlarged and the goods forfeited. In both cases, the nature of the penalty is the same, only in one case it is satisfied by the imposition of a certain amount of money, while in the other a total forfeiture is demanded.

To the question, why the additional sum is imposed in the one case, or why the goods are forfeited in the other, there can be but one answer. It is because of the action of the importer with relation to the importation in question, and in one case such action calls down upon his head punishment by way of a money imposition, and in the other it is a forfeiture of his property. In either case there is to be punishment, either for careless ness or fraud.

Although the statute, under section 7, (*supra,*) terms the money demanded as "a further sum," and does not describe it as a penalty, still the use of those words does not change the nature and character of the enactment. Congress may enact that such a provision shall not be considered as a penalty or in the nature of one, with reference to the further action of the officers of the government, or with reference to the distribution of the moneys thus paid, or with reference to its effect upon the individual, and it is the duty of the court to be governed by such statutory direction, but the intrinsic nature of the provision remains, and, in the absence of any declaration by Congress affecting the manner in which the provision shall be treated, courts must decide the matter in accordance with their views of the nature of the act. Although the sum imposed by reason of undervaluation may be simply described as "a further sum" or "an additional duty," if it is yet so enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer, such facts clearly show it is a penalty in its intrinsic nature, and the failure of the statute to designate it as a penalty, but describing it as "a further sum," or "an additional duty," will not work a statutory alteration of the nature of the imposition, and it will be regarded as a penalty when by its very nature it is a penalty. It is impossible, judging simply from its language, to hold this provision to be other than penal in its nature.

But it is urged that although this part of the section may be of a penal character within the ordinary or general meaning of the words, yet as used in the various statutes upon the subject it will be seen that those words are not regarded by Congress as imposing a penalty and should not be so treated by the court. If it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will. This leads to a short examination of the previous legislation upon the subject.

By the act of April 20, 1818, chapter 79, sec. 11, (3 Stat. 433, 436,) the manner of collecting the additional sum imposed by reason of undervaluation was by adding fifty per centum to the appraised value of the property, and on that aggregate amount the usual duties were to be estimated. The twenty-fifth section of that act enacted "That all penalties and forfeitures incurred by force of this act shall be sued for, recovered, distributed and accounted for in the manner prescribed by" the act of March 2, 1799, (1 Stat. 627,) "and may be mitigated or remitted, in the manner prescribed" by the act of March 3, 1797, (1 Stat. 506.)

In an opinion delivered by Attorney General Wirt, February, 1821, (5 Opinions of Attorneys General, 730,) that officer ruled that the fifty per centum provided by section 11 could not be remitted, because he

thought that by the language of the statute Congress permitted the Secretary of the Treasury to remit penalties or forfeitures only in such cases where by the provisions of the act they could be recovered by suit. He did not deny that the additional sums imposed by statute were in the nature of penalties, but the fifty per centum not being recoverable by suit, he thought the Secretary of the Treasury had no power to mitigate or remit.

By the act of March 1, 1823, (3 Stat. 729, 734, sec. 13,) reference was made to a penalty of fifty per centum, (the same provision in substance as is set forth in the statute under consideration, only different amounts are provided for,) and Congress described the provision as a penalty.

Section 9 of the act passed May 19, 1828, (4 Stat. 270, 274,) provided that where the appraisement exceeded by ten per centum the invoice value there was to be imposed in addition to the duty imposed by law on the same property fifty per centum of the duty imposed on the same goods when fairly invoiced, and this amount is described in the statute as a duty of fifty per centum. Further on in the same section, it is provided that the penalty of fifty per centum imposed by the thirteenth section of the act approved March 1, 1823, (*supra*,) was not to attach to any of the property subject to the additional duty of fifty per centum imposed by section 9 of the act of 1828. The sum imposed was in its nature no more a penalty under the thirteenth section of the act of 1823 than it was a penalty under the ninth section of the act of 1828, yet in the earlier act it is described as a penalty and in the later a duty. The mere description was evidently not regarded as of vital importance.

By section 17 of the act of 1842, chapter 270, (5 Stat. 548, 564,) the amount imposed is stated to be "in addition to the duty imposed by law on the same there shall be levied and collected on the same goods, wares and merchandise fifty per centum of the duty imposed on the same, when fairly invoiced." Although this fifty per centum, mentioned in the above act, is not designated in terms as a penalty, yet it was regarded as such by the then Attorney General, Legare, who in response to the question put by the Secretary of the Treasury, whether the latter had power to remit it as a penalty within the meaning of the act of 1795, stated that in his opinion he had, as it was very clear that the fifty per centum was a penalty. (4 Opinions of Attorneys General, 182.)

By the act of February 11, 1846, relative to collectors and other officers of the customs, (9 Stat. 3, section 3,) it was provided that no portion of the additional duties mentioned in the seventeenth section of the act of 1842, (*supra*,) "should be deemed a fine, penalty or forfeiture" for the purpose of being distributed to any officer of the customs, but the whole amount thereof when received was to be paid directly into the Treasury. This would seem to be a recognition on the part of Congress that the additional

duties mentioned in the seventeenth section would be regarded as penalties, and that it was necessary to provide specifically that they should not be so treated, so far as distribution was concerned. It may possibly be that the legislation was enacted in order to meet the construction of the seventeenth section put upon it by the Attorney General in his answer to the Secretary of the Treasury, June 7, 1843. At any rate, the opinion and the legislation show that the additional duties had been regarded as penalties, and that such construction was only altered by Congress to the extent of providing that for the purpose of being distributed to any customs officer they should not be so regarded.

The statute of July 30, 1846, chapter 74, (9 Stat. 42,) relating to duties, by its eighth section provided that, in case of undervaluation, in addition to the duties imposed by law, a duty of twenty per centum ad valorem on such appraised value should be imposed, using the same language substantially as had been used in the seventeenth section of the act of 1842, only reducing the amount from fifty to twenty per centum.

By the twenty-third section of the act approved June 30, 1864, chapter 171, (13 Stat. 202, 216,) it is again declared that, "in addition to the duties imposed by law on the same there, shall be levied, collected and paid a duty of twenty per centum, ad valorem, on such appraised value."

The language used in these various statutes in making provision for the imposition of additional sums on account of the action of the importer in undervaluing the goods imported, does not give any clear indication on the part of Congress that the sum imposed shall not be regarded as a penalty excepting as to the act of 1846, (9 Stat. 3,) relative to collectors, &c., and there the provision is limited to the statement that the sum shall not be deemed a fine, penalty or forfeiture for the purpose of being distributed to any officer of the customs. At that time, it must be remembered, moiety legislation was in force, by which a certain proportion of some fines and penalties was distributed to the customs officer.

By the act of July 29, 1897, chapter 11, section 32, (30 Stat. 212,) Congress has plainly directed that the additional duty therein spoken of shall not be construed as a penalty, and shall not be remitted nor payment thereof in any way avoided, with the exception stated in the statute. As this statute was passed subsequently to the importation mentioned in this case, it does not affect the question as to the character of the legislation which preceded it and which had no such provision as is contained in the last act. It was under the act as it stood in the customs administrative act of 1890, the same under which the question here arises, that on September 9, 1893, Mr. Olney, who was then Attorney General, gave an opinion upon this same question in response to a communication from the Secretary of the Treasury, (20 Opinions Attorneys General, 660.) In that

opinion the Attorney General reviewed the previous legislation of Congress on this subject and came to the conclusion that, as the law then stood, the additional duty, so-called, was in its nature a penalty, and that being so, it was subject to remission like other fines, penalties and forfeitures by the Secretary of the Treasury.

Referring to some of the decisions of this court, we think it is made quite apparent that these provisions of the statute were regarded as in the nature of penalties.

In *Bartlett* v. *Kane*, (16 How. 263,) decided in 1853 under the statute of 1846, where the question of drawback arose, the additional duty of twenty per centum mentioned in the act was regarded as in the nature of a penalty. Mr. Justice Campbell, in delivering the opinion of the court, (at page 274,) said:

"An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty. . . . It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice."

In *Greeley* v. *Thompson*, (10 How. 225,) Mr. Justice Woodbury, speaking of the language on this subject used in the act of 1842, (at page 238,) said: "Especially in a penal provision, it could not seem judicious, any more than legal, to extend it beyond the clear language of the act;" and he referred to the immediately succeeding case of *Maxwell* v. *Griswold*, at page 242. In that case, as stated by Mr. Justice Woodbury, in the opinion of the court, (at page 255,) "The importer had put in his invoice the price actually paid for the goods, with charges, and proposed to enter them at the value thus fixed. But the collector concluded in that event to have them appraised, and the value would then, by instructions and usage at New York, be ascertained as at the time of the shipment, which was considerably higher, and would probably subject the importer, not only to pay more duties, but to suffer a penalty. The importer protested against this, but in order to avoid the penalty under such a wrong appraisal, adopted the following course." And again, in speaking of the manner in which the question arose, the justice continued: "The importer, knowing that

this would subject him to a severe penalty, in order to avoid it, felt compelled to add to his invoice the amount which the price had risen between the purchase and shipment." This is in relation to the language already referred to in the act of 1842.

In *Ring* v. *Maxwell*, (17 How. 147,) the court did not find it necessary to determine whether the additional duties prescribed under the acts of 1842 and 1846 might have been deemed penalties, because the court was of opinion that whatever was the nature of the sums levied as additional duties under the eighth section of the act of 1846, they were not distributable to the customs officers as penalties.

In *Stairs* v. *Peaslee*, (18 How. 521,) it was said that the penal duty of twenty per centum exacted by the eighth section of the tariff act of July 30, 1846, (9 Stat. 43,) was properly levied upon goods entered at their invoice value. Mr. Chief Justice Taney, (page 527,) in speaking of the language of the act of 1842, (5 Stat. 563, *supra*,) providing for levying an additional fifty per centum because of undervaluation, said:

"It would seem, however, that this provision was found by experience to operate, in some instances, unjustly upon the importer; and that it sometimes happened that, under favorable opportunities of time or place, goods were purchased in a foreign country for ten per cent less than their market value in the principal markets of the country from which they were imported into the United States. And if they were so invoiced, the importer was liable for the above-mentioned penal duty, although he was willing and offered to make the entry at their dutiable value. The fact that the invoice value was ten per cent below the standard of value fixed by law, subjected him to the penal duty; and he had no means of escaping from it. The eighth section of the tariff act of 1846 was obviously intended to relieve the importer from this hardship."

See also *Swanston* v. *Morton*, (1 Curt. 294,) where the court described it as an additional duty, by way of penalty, and the court was by no means clear that the strictly technical term appropriate to such a demand would not be the word "penalty," though in that case it did not feel compelled to go so far.

In *Passavant* v. *United States*, (148 U. S. 214,) the question of whether these sums are to be regarded as penalties or simply additional duties was not regarded as material, and consequently was not decided in terms, although the case of *Bartlett* v. *Kane*, (*supra*,) was quoted from as to the sums imposed by statute being "a compensation for a violated law," &c.

From these various decisions it is seen that the courts have either regarded the language used in these statutes as penal in its nature, and that the sums imposed under the various sections of the statutes were imposed as penalties or the property forfeited, for the careless or fraudulent conduct of the importer in making an undervaluation, or else they have declined

to decide the question, because not involved. We think the sum sought to be recovered in this action was a penalty, and the Circuit Court, therefore, had no jurisdiction.

Whether the Secretary had the power, after he had once reduced the amount to be paid, to raise it to the original sum, as stated in the foregoing certificate, is not material to the question now before us, and we express no opinion regarding it.

The question propounded by the Circuit Court of Appeals is answered in the negative, and it will be

So certified.

True copy.

Test:

Clerk Supreme Court, U. S.